EXHIBIT 22

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	.	
Debtor.	.	
	.	Adv. No. 21-03067(SGJ)
CHARITABLE DAF FUND, LP, et al.,	.	
Plaintiffs,	.	Earle Cabell Federal Building
	.	1100 Commerce Street
v.	.	Dallas, Texas 75242
HIGHLAND CAPITAL, MANAGEMENT, L.P., et al.,	.	
Defendants.	.	Tuesday, November 23, 2021
	.	9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

Audio Operator: Hawaii S. Jeng

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

LIBERTY TRANSCRIPTS
7306 Danwood Drive
Austin, Texas 78759
E-mail: DBPATEL1180@GMAIL.COM
(847) 848-4907

TELEPHONIC APPEARANCES:

For CLO Holdco, Ltd.:	Sbaiti & Company PLLC BY: MAZIN AHMAD SBAITI, ESQ. JP Morgan Chase Tower 2200 Ross Avenue, Suite 4900 W Dallas, Texas 75201
For Highland Capital Management:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, NY 10017
	Pachulski Stang Ziehl & Jones LLP BY: JEFFREY N. POMERANTZ, ESQ. 10100 Santa Monica Blvd., 13th Floor Los Angeles, California 90067
For Highland CLO Funding, Ltd.:	Brobeck Phleger & Harrison BY: JONATHAN W. JORDAN, ESQ. 4801 Plaza on the Lake Austin, Texas 78746
	King & Spalding LLP BY: PAUL RICHARD BESSETTE, ESQ. 500 West 2nd Street, Suite 1800 Austin, Texas 78701

INDEX

THE COURT: Good morning. Please be seated.

All right. We have a setting in the Charitable DAF Fund, et al., v. Highland, Adversary 21-3067. We have three motions that are set.

Let me get appearances from the Plaintiffs' counsel first. Go ahead.

MR. SBAITI: Good morning, Your Honor. This is Mazin Sbaiti for the Plaintiffs.

THE COURT: Okay. Thank you.

Now for the Defendants, who do we have appearing?

MR. POMERANTZ: Good morning, Your Honor. It's Jeff Pomerantz and John Morris from Pachulski Stang Ziehl & Jones. Your Honor, before -- I understand Your Honor is going to take up the motion to stay first.

Before Your Honor does so, I have a procedural issue relating to that motion that I would like to address the Court after appearances are made.

THE COURT: All right. I assume that's all the lawyer appearances for this adversary.

MR. JORDAN: Your Honor?

THE COURT: Oh, go ahead.

MR. JORDAN: Your Honor, we are a nominal defendant, but John Jordan on behalf of Highland CLO Funding, Ltd.

THE COURT: Okay. Thank you. Sorry about that.

MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

Jordan's colleague is on the phone, as well.

THE COURT: Okay. Thank you.

All right. Anyone else I missed?

(No audible response)

THE COURT: All right. Mr. Pomerantz, your procedural issue?

MR. POMERANTZ: Thank you, Your Honor.

Your Honor, I must once again bring to this Court's attention a violation of the Court Rules by the various counsel representing Mr. Dondero. This time it's by Mr. Sbaiti.

When the district court entered its order granting Highland's motion to enforce the reference and referring this matter to Your Honor, there were three matters on the Court's docket, district court's docket that got transferred. First was the motion to dismiss, second was the motion to stay, and third was the motion to strike, which essentially has been rendered moot.

The briefing was complete with respect to the first two matters, the motion to dismiss and the motion to stay. And all that remained for the Court to do was to set a hearing and have oral argument. Your Honor, on October 13th, Your Honor set a hearing for today for each of those two motions. Nevertheless, on November 10th, almost a month after the Court set the matters for hearing and after pleadings were closed, Plaintiffs filed what they called their amended motion to stay.

As an initial matter, Your Honor, the amended motion was not even filed in this adversary proceeding initially. It was filed in the main case, and there was an error that Mr. Sbaiti corrected on November 18th, five days before this hearing. Plaintiff did not ask for leave of court to file any further pleadings. They did not provide the time under the local rules for response. And, in fact, they raised additional arguments in their amended motion.

Well, Your Honor, we can certainly argue to the Court that the amended motion constitutes a new motion, is untimely, and the hearing should be continued to allow us to file a response. We're not going to do that, Your Honor. As I will discuss when it's my time to response substantively to the motion, the new arguments to stay the proceedings, the amended motion are equally as frivolous as the arguments contained in the original motion.

But I bring this to the Court's attention because, again, it's extremely frustrating to have the lawyers representing Mr. Dondero's related entities continue to act as if the rules do not apply to them. Your Honor will recall just a week or so ago, Your Honor made a -- we had a similar issue in connection with the motion to dismiss. Failure to follow the rules is unprofessional, and it's disrespectful not only to Highland's professionals but also to the Court and it interferes with Your Honor's ability to control your docket and

sufficiently prepare for contested matters.

At some point, Your Honor, there should be real consequences for the continued violation of the rules. Having said that, Your Honor, we are prepared to go forward with the motion to stay today.

THE COURT: All right. Mr. Sbaiti, what say you? I'm looking at Docket Entry Number 69 in the adversary proceeding that was filed last Thursday. So, obviously, very, very late in the game, shall we say. What is your response to this?

MR. SBAITI: Your Honor, that was not filed in the adversary as an error. When we asked one of our paralegals to file it, we're not as familiar with the bankruptcy court system and it was an error. It was corrected once the lawyers realized it, which was last -- which was on November the 18th. It was filed in, I guess in the main case. But it was simply an inadvertent error, Your Honor.

MR. POMERANTZ: I would add, Your Honor, the original motion filed inadvertently was November 10th. It still was not timely. I think Mr. Sbaiti needs to answer the question of why that was filed untimely, okay.

THE COURT: All right. Thank you, Mr. Sbaiti.

So, one of my pet peeves in life is people blaming paralegals, by the way. But be that as it may, as Mr. Pomerantz points out that it was still untimely the motion

filed in the underlying bankruptcy case November 10th. So what is your --

MR. SBAITI: Your Honor, when we looked at the motion and looked at the progression of the case, we filed an amended motion simply to clarify our position. And really I don't think we've changed our arguments all that much. We simply clarified our position. We've seen amended motions filed in the bankruptcy in our prior dealings, and so at that point, we felt like there wasn't a rule explicitly saying we couldn't have an amended motion.

But if it's untimely, Your Honor, you know, we don't think it changes the underlying arguments. As Mr. Pomerantz said, we don't think there's any prejudice to Highland either.

THE COURT: All right. Well, just to be clear, you know, it's one thing in an underlying bankruptcy case to file an amended motion after you've gotten a motion set for hearing that might slightly adjust, you know, facts or relief sought. And, of course, we independently look at it when it happens in an underlying case to see do we need more notice to affected parties.

But in an adversary proceeding, you know, you just don't do this. All right? If you have some sort of exceptional circumstances, you can file I guess a motion to amend because I got to include this new information that didn't exist. But you just don't do this, okay?

So I don't -- could you be clear what was the new information? What was the new information that had to be brought before the Court suddenly?

MR. SBAITI: Your Honor, there wasn't new information. We were simply giving notice of our understanding of where the legal arguments were going. The reason being is that after those motions were filed and recently, the debtor took the position in two other cases that they should be dismissed pursuant to the permanent injunction.

And so that clarified for us at least a couple of arguments that were unclear to us where the debtor stood on whether or not the permanent injunction would be a basis to dismiss or stay any of the claims that were pending. There are two other claims pending in district court. Since we had filed that motion, the debtor filed a motion to reconsider the stays that were granted in those two courts. And then they also moved to dismiss on the basis of the permanent injunction.

And so given that the debtor took the position that they were willing to dismiss those cases based upon the permanent injunction, it in many ways contravenes the position they took in response to our motion which is that the -- for example, they somewhat take the position in Paragraph 22, it wasn't as clear then but it's clear -- it seems clearer now that the permanent injunction is not relevant to whether or not the case can go forward in any capacity.

And so we simply wanted to incorporate that, but it's mainly legal argument about the choices that are before the Court. That was really it. I mean, theoretically, I would have made them for the first time during oral argument and we thought we were doing something good by giving -- apprising the Court in writing and giving notice of these arguments to the other side by filing an amended motion. We didn't add new evidence or anything like that.

MR. POMERANTZ: Your Honor, that argument is completely disingenuous because our motion to dismiss and motion for reconsideration that Mr. Sbaiti refers to is several weeks ago, okay. It wasn't November 10th. It was several weeks ago.

I will respond substantively why Mr. Sbaiti is wrong and there's no inconsistent positions when it's my time to speak. But for Mr. Sbaiti to say he was doing us a favor and he was reacting to recent new information is just wrong, Your Honor. And they should just not be continued to allowed to get away with flouting the rules.

THE COURT: All right. Well, let me just say I'm confused, maybe I should say baffled, about this amended motion. You know, the motion to dismiss that is before the Court for oral argument today isn't about the injunction, isn't about the plan injunction. It's about res judicata and other 12(b)(6) arguments.

So I'm confused and I think, you know, it's been clear for many months in this adversary proceeding, in particular, the debtor's position on the plan injunction, particularly, you know, in the whole argument on the motion to leave to add Mr. Seery as a defendant.

So I'm confused, but we're going to go forward on the argument today, whatever argument you want to make. And you've been, I guess, forewarned. I will say that these last-minute amended motions are not going to be tolerated, are not going to be considered. And so, you know, I hope you won't do it again. Your firm has already been sanctioned once in this adversary proceeding. I'm sure we all remember.

So, you know, I'm just kind of baffled why you would take a chance filing an amended motion without leave or somehow getting it to the attention of the Court or running it by the other parties for their consent to you doing it. But we're going to go forward and just hear the arguments, okay. And so --

MR. SBAITI: Thank you.

THE COURT: -- I'll hear your argument.

I'm letting people know I don't know where this time estimate came on the calendar today, three hours. I don't know if someone specifically expressed that. But I'm letting you know at noon I have a swearing-in ceremony that I'm doing back in my chambers. So I will stop at noon Central time.

And so does anyone think that's going to be a problem?

MR. SBAITI: It should not be, Your Honor, from our perspective.

THE COURT: Mr. Pomerantz?

MR. POMERANTZ: I don't believe so. Mr. Morris is going to handle the motion to dismiss which is going to be the bulk. My presentation on the motion to stay is only going to be around ten minutes or so.

THE COURT: Okay. Thank you.

Mr. Sbaiti, your argument on the motion for stay.

MR. SBAITI: Thank you, Your Honor.

Your Honor, may I share my screen?

THE COURT: You may.

MR. SBAITI: I have a PowerPoint that can kind of --

THE COURT: Okay. You may.

MR. SBAITI: -- walk us through. Thank you.

Is Your Honor able to see my screen?

THE COURT: I can, yes.

MR. SBAITI: Thank you, Your Honor.

Your Honor, what I would point you to is, first, the injunction language. This is what Your Honor's permanent injunction says, and this is really what animates our motion to stay. Out motion to stay is derived specifically because my clients and I feel like our case has been enjoined by this

injunction, if not completely disposed of.

The language says that we're an enjoined:

"An enjoined party is permanently enjoined from commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind including any proceeding in a judicial, arbitral, administrative, or other forum against or affecting the debtor or the property of the debtor."

And then (v) of that injunction says:

"or acting or proceeding in any manner in any place whatsoever that does not conform to or comply with the provisions of the plan."

One of the things that was suggested in Paragraph 22 of their response was that the DAF and Holdco are not enjoined parties. But the final plan defines an enjoined party in Article 1(b)(56) as any entity who has or -- all entities who have held, hold, or may hold claims against the debtor; any entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 case regardless of the capacity in which such entity appeared and any other party in interest. And, five, the related persons of each of the foregoing.

Article 1(b)(22) defines a claim as any claim that's defined in Section 1015 of the Bankruptcy Code. And Section 1015 of the Bankruptcy Code defines a claim as a right to

payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

So given this definition, when we've read this injunction, we believed that we were enjoined parties, the DAF and Holdco were both enjoined parties. They had appeared in the -- they have claims. Obviously, those are the claims being asserted here.

And so going back to the injunction language, we believe this lawsuit has been disposed of by this permanent injunction. We believe there's really only one or two things that should probably happen with this lawsuit. Either it could be dismissed based upon the permanent injunction or what we proposed in our motion to stay is that the Court exercise its inherent authority to simply stay the case pending the appeal of this language, which is up on appeal in the Fifth Circuit right now.

If that language, and if the injunction gets affirmed by the Fifth Circuit, then certainly the dismissal can happen once that affirmance happens and there's no harm, no foul, and no one's wasted any time.

If they're not, if it's overturned, then, obviously, the injunction would be vacated, presumably by the Fifth Circuit. And at some point, if the Court decides not to enter

a similar injunction that would likewise dispose of this case, then the case could proceed on the merits.

The issue we've identified both in our original motion and as we fleshed out in our -- as a matter of law in our amended motion to simply put a finer point on it is that the merits are now -- have been disposed of. This injunction ends this case, at least as far as we read it. It ends this case irrespective of the underlying merits of the lawsuit, which means that the lawsuit merits themselves have become moot and any opinion or any attempt to resolve it is obviously an advisory opinion by the Court.

So we really only see two ways that this could go right now without either gutting the injunction or circumventing it completely, which is to say that either the case should be dismissed based upon the permanent injunction or the case should be stayed based upon the permanent injunction.

Mr. Pomerantz or the debtors' brief suggests that, well, the injunction doesn't prevent hearing pending motions. But I would respectfully disagree with that. If you look at the language, "commencing, conducting, or continuing in any manner in any suit, action, or other proceeding against or affecting the debtor."

As 12(b)(6) hearing, I would imagine, was intended to fall under the umbrella of a proceeding. And us arguing a 12(b)(6) motion would us be conducting and maybe even

continuing the suit because we're trying to protect the merits of the suit, which as I said are at this juncture already moot.

And so it comes down to I think a very simple question, which is what do we do at this juncture. Do we just simply dismiss the lawsuit in light of this permanent injunction or stay the lawsuit in light of this permanent injunction?

The debtor makes a lot of hay out of the fact that, well, there are special rules that apply when you're trying to stay a case pending appeal. But if you look at all of their case law, it has to do with different circumstances where an appeal -- where there's a matter on appeal that could substantially affect the resolution of the case, which here we think it actually could. But in those cases, those appeals would affect the resolution of the case on the merits; whereas, here, the question goes to whether or not a permanent injunction that really has stopped us all in our tracks.

As soon as we understood this injunction and its scope, we're the ones who reached out to the debtor's counsel and asked them on a meet-and-confer whether or not they would just agree to stay the matter. And we were a little bit surprised by their reaction when they first didn't think that this applied to our case, and we didn't understand how. And then they changed their mind, said it did apply to our case but they didn't think that we should stay the case. And they

didn't suggest let's just dismiss it based upon the permanent injunction.

So it kind of comes down to the same small -- same simple issue, Your Honor. There's this permanent injunction, and I don't think there's any way for us to get around it at this juncture.

THE COURT: Mr. Pomerantz:

MR. POMERANTZ: Yes, Your Honor.

I'm going to respond to several of the arguments Mr. Sbaiti made in his motion, which apparently he's abandoned because he only is focused on the injunction. And I'm also going to tell Your Honor, what our arguments are because despite Mr. Sbaiti's efforts, he's completely misquoted them.

So in the motion and the amended motion, the Plaintiffs make several arguments why this Court should stay the matter. First, they argue they're entitled to a stay because the exculpation provision in the plan prohibits them from proceeding against the Defendants in the action. And there are several problems with that argument.

First, Mr. Sbaiti and the Plaintiffs don't even attempt to meet the Fifth Circuit's standards for a stay pending appeal because, of course, they can't. Mr. Sbaiti's trying to sidestep the grounds for a stay pending appeal by arguing it doesn't apply just is incorrect.

They would have to show that there is a likelihood of

success on the merits, they would suffer irreparable harm, the debtor wouldn't suffer irreparable harm, and there is -- public interest supports a stay. They can't do any of them.

In fact, as Your Honor is well aware, Your Honor denied the actual appellants in that suit, in that order, the confirmation order, a stay pending appeal and that was denied by the district court and also denied by the Fifth Circuit Court of Appeals.

The Plaintiffs didn't object to the plan, they are not parties to the appeal, and they never sought a stay pending appeal. So they really can't explain why they as really strangers to the appeal are entitled to a stay of the effectiveness of the plan when the actual appellants to that order were denied a stay pending appeal up through the appellate ladder.

Second, notwithstanding Mr. Sbaiti's arguments in the motion, the exculpation provision is neither as broad nor does it affect all the parties that are subject to this litigation. There are three Defendants in the complaint. The only Defendant that is covered by the exculpation provision is the debtor. The exculpation provision does not apply HCF Advisors, and it does not apply to Highland CLO Funding.

Also, while the exculpation provision does apply to the debtor, it only exculpates the debtor from claims of negligence. The complaint raises a variety of causes of action

that have nothing to do with negligence and would not be covered by the exculpation provision.

But, Your Honor, the biggest problem with their argument that the exculpation provision supports a stay is that the exculpation -- the appeal of the exculpation provision has nothing to do with this case. Why? Because the Fifth Circuit appeal concerns whether the exculpation provision is appropriate for parties other than the debtor. The debtor is the only Defendant in this case that obtains the benefit of the exculpation.

And there is no dispute, there was no dispute at confirmation, there's no dispute in the case law, there's no dispute in Pacific Lumber, there's no dispute in the appeal that a plan can exculpate the debtor. So the Fifth Circuit appeal doesn't implicate the exculpation provision and cannot support a basis for a stay.

The next argument Mr. Sbaiti makes is the injunction provision, and the injunction provision is on appeal to the Fifth Circuit. But the aspect of the appeal of the injunction is not the provision that Mr. Sbaiti points to.

And, again, as with the exculpation provision, the same arguments about failure to obtain a stay, failure to be party to the appeals, and failure to object to the plan apply, as well. But as is the case with the exculpation provision, the resolution of the appeal of the injunction provision will

not affect this case in any way.

They point to the portion of the injunction that prohibits enjoined parties from directly or indirectly continuing, commencing, or conducting in any manner any suit or action proceeding against the debtor. They argue that they cannot proceed without violating the injunction because the injunction was intended to put all litigation against the debtor to an end.

But, of course, Your Honor, that is not true. That is not what the injunction is. The issue on appeal before the Fifth Circuit as it relates to the injunction is whether the injunction impermissibly enjoins parties from enforcing their rights with respect to post-effective date commercial relationships with the reorganized debtor. And, of course, we argue that it's appropriate, but it has nothing to do with the provision Mr. Sbaiti identified.

The appeal does not impact in any way whether a plan can enjoin prosecution of claims that arose prior to the effective date. And, of course, such a plan provision is completely appropriate and is customary. The plan provided the debtor as the plan provides all debtors with a fresh start and enjoins litigation against the debtor.

But importantly, Your Honor, that does not mean as Plaintiffs argue that any liability for pre-effective date conduct just goes away and that creditors are left without a

remedy to pursue claims against the debtor for pre-effective date conduct.

Rather, if they have a pre-petition claim in lieu of their litigation that's pending, they file a pre-petition claim against the estate and that matter is resolved in the claims objection procedure. Or, as in the case here, when they make an allegation that there is a post-petition claim, what do they do? They file a request for payment of an administrative claim, and this Court addresses the validity of the administration claim. The lawsuit pending in another jurisdiction stops, but the claim has to be resolved in the bankruptcy court.

The only conduct that the injunction really prohibits is them from proceeding with actions in other courts. It does not deny them a remedy. Accordingly, their argument that they cannot proceed with claims against the debtor because of the injunction provision just lacks any merit and can't form the basis for a stay.

Plaintiffs' next argument in their briefing is that if the Court refuses to stay the complaint, they will file a motion to withdraw the reference of this matter to the district court. Your Honor, this is the biggest head-scratcher of them all given how this complaint ended up before Your Honor. This exact issue and Plaintiffs' arguments as to why the reference should be withdrawn have already been fully briefed and decided

by the district court.

As Your Honor may recall, the Plaintiff filed this action in the district court, conveniently failing to include the bankruptcy case as a related case or mentioning that the bankruptcy courts have related jurisdiction in the filings. Your Honor may have had occasion to review the underlying complaint when the debtor brought a motion for contempt against counsel for Plaintiffs for pursuing a claim against Mr. Seery in violation of Your Honor's January 9th, 2020 and July 16th, 2020 orders.

Your Honor issued an order finding counsel and various parties in contempt which order is, of course, subject to appeal. At the time we were litigating the contempt motion, we filed two motions in district court. The first was a motion to enforce the reference and have the district court send that complaint to Your Honor. And that motion to enforce the reference is now on Your Honor's docket at Number 22 and 23.

The second was the motion to dismiss which is before Your Honor today. Plaintiffs oppose the motion to enforce the reference arguing that mandatory withdrawal was required because the matter involved consideration of non-bankruptcy federal law, specifically federal securities laws and the Investment Advisors' Act.

Plaintiffs further argue to the district court why would you refer the case to the bankruptcy court if it's only

going to end up back in the district court upon mandatory withdrawal of the reference. They argue to the district court that would be a complete waste of time.

We filed our reply at Docket Number 42 explaining to the district court why mandatory withdrawal of the reference did not apply and why this case should be referred to Your Honor. And what did the district court subsequently do? It entered an order referring this action to Your Honor which is why we are here today.

Plaintiffs now flout the district court's order of reference by telling the Court that if the Court does not stay the matter, they will file a motion to withdraw the reference before Your Honor, and they attach virtually identical pleading that they filed in opposition to our motion to enforce the reference.

Plaintiffs did not disclose in their amended motion that there was a fully-briefed motion to enforce the reference before the district court. Plaintiffs' argument is disingenuous and designed to mislead the Court.

The district court has only agreed that mandatary withdrawal of the reference does not apply and this case belongs in Your Honor. And while we cannot stop the Plaintiffs from filing any motion before this Court, we want to put them on notice that if they do file a motion for withdrawal of the reference in light of the facts as I just stated them, we will

seek sanctions.

In any event, Your Honor, the fact that they may file a motion for withdrawal of the reference at some point in the future is not grounds to stay the matter.

Lastly, Your Honor, Plaintiffs argued in the opening that Highland's position today in opposing the motion to stay is inconsistent with positions Highland has taken in two other lawsuits commenced by the Sbaiti firm. Like all of their other arguments, they misrepresent the facts and are frivolous.

The Sbaiti firm filed a complaint on behalf of the DAF in the district court arguing that Highland mismanaged (audio drop). That complaint followed in the heels of an almost identical complaint filed by Dugaboy asserting the same claims.

And Your Honor may recall questioning Mr. Sbaiti at a hearing in June how Dugaboy could pursue such a claim in the district court if Dugaboy had a pending proof of administrative claim on file in the bankruptcy case. Well, soon after that hearing, Your Honor, the Dugaboy complaint was dismissed, and a few days later the DAF complaint was filed. That complaint has never been served on Highland.

The second lawsuit is also a lawsuit filed by the Sbaiti firm on behalf of an entity called PCMG in the district court. And PCMG previously held less than five one-hundredths of a percent interest in a certain fund managed by highland.

The lawsuit alleges that Highland acted improperly to sell certain assets of the fund, thereby damaging PCMG. That complaint has also never been served on Highland.

The Plaintiffs sought a stay of those matters before Highland could file a response, and the court -- the district court's entered stays in those matters. And Highland has filed motions for reconsideration and the motions to dismiss because they violate the injunction.

But, importantly, Your Honor, if you read the motions, Highland does not argue that Plaintiffs do not have a remedy for the alleged wrongs they say they suffer. Rather, Highland's argument is that any claims alleged in those lawsuits, just like any claims alleged in the lawsuit before Your Honor today, must proceed in bankruptcy court as part of the claims objection process. That's where they will have their day in court. The lawsuits don't go away. The injunction prevents them from continuing on in district court.

Accordingly, Highland is being totally consistent in all matters, and the litigations may not proceed there but must proceed before Your Honor. And, of course, none of these three matters are implicated by the Fifth Circuit appeal.

Your Honor, the amended motion was procedurally improper and is substantively without merit. And for all these reasons, we request that the Court deny the stay motion and proceed with the hearing on the motion to dismiss.

Thank you, Your Honor.

THE COURT: All right.

Mr. Sbaiti, you get the last word.

MR. SBAITI: Thank you, Your Honor.

Your Honor, the administrative claim process that was described as being the way that these claims were supposed to proceed, by the language of the order that we read, does not allow for these claims. Those claims are limited to a specific category of claims that don't include the claims that are alleged in this lawsuit.

And in any event, this lawsuit wasn't filed as an administrative claim. So if that's the case and it needs to be refiled or reasserted as an administrative claim, then I think that's a subject for another day. All I know is that we have this injunction right now that either should stay this case pending the appeal, which I'll address the issue on appeal in a moment, or it should be dismissed, perhaps without prejudice so that it can be refiled properly as an administrative claim if that's what's supposed to happen, because I guess this converts the matter.

The appeal, the subject of the appeal as to the injunction, Your Honor, the appeal actually encompasses many of the issues that we're talking about in this case. Now Mr. Pomerantz tries to narrow the scope of what's up on appeal, and that may indeed be the argument that they're going to present

to the Fifth Circuit or that they've presented to the Fifth Circuit.

But the actual issue up on appeal is the enforceability and validity of the order for a variety of reasons which includes the provision that we're talking about and the enforceability of the provision that we're talking about because it gets rid of particular claims. And I guess the argument back is, no, it doesn't because there's now an alternative means of going there.

Mr. Pomerantz says that we shouldn't have proffered a motion to enforce the reference. That proffer, however, was because Judge Boyle's reference to this Court didn't deal with our motion to -- our cross-motion to withdraw the reference. All it dealt with was their motion to enforce the reference as a -- to enforce the standing order in the district court. And that's all she ordered was she cited the standing order and the statutes, I think it's 157(a), and that's really all it did.

So it left open the question of whether she wanted Your Honor to deal with the withdrawal of the reference specifically as to the 12(b)(6) issue in the first instance. It didn't resolve the question. It doesn't purport to resolve that question. And it's not unheard of for the district court then to send the matter to the bankruptcy court and then to piecemeal which proceedings the withdrawal of the reference is applicable to and then all the other proceedings would stay

with Your Honor or with the bankruptcy court.

So we weren't flouting the district court's order, and we certainly weren't flouting any of the previous orders. And the threat of a sanction for simply exercising our rights in due course is not well taken.

Now Mr. Pomerantz says, well, the DAF and CLO Holdco are not parties to the appeal. I don't think that's relevant because if the provision is struck by the Fifth Circuit, it's not only struck for the appellants, it's struck as to all. It's either valid or it's invalid. And even if it's declared to be invalid only as to the appellants, it's not suddenly valid as to everyone else who didn't appeal. That's not generally how these appeals have worked.

If the Court doesn't stay this matter, Your Honor, and doesn't dismiss it, we still maintain, Your Honor, that as it stands today, the question on the merits have been mooted and we cannot proceed. I think what Mr. Pomerantz is hoping for or the debtor is hoping for is a provision where our hands are potentially tied to argue the motion.

And if the Court tells us they're not, then we'll certainly argue the 12(b)(6). But what I don't want to do is argue a 12(b)(6) motion that on its face appears to violate the permanent injunction and then be held in contempt for violating that injunction.

And so that's why we've asked for the Court to either

stay the matter under its inherent jurisdiction or to -- if you're going to -- if it's not going to be stayed, then we believe it has to be dismissed according to the permanent injunction as it stands right now.

THE COURT: All right.

The motion to stay is denied. The amended motion to stay is likewise denied. This is an odd argument. I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.

So suffice it to say the four-prong test for a stay, you know, hasn't been met here. There hasn't been a showing of substantial likelihood of success on the merits or irreparable injury if the stay's not granted or a stay will not substantially harm others or the stay would serve a public interest.

But going on to the arguments that were focused on by movant, I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

So the motion for stay is denied, and I will ask Mr. Pomerantz to submit an order reflecting the Court's ruling.

So it looks like we have another procedural matter, Mr. Sbaiti. You filed a motion to strike reply appendix of the Plaintiffs quite a while back. So did you want to present that?

MR. SBAITI: Yes, Your Honor. I think it's a very simple procedural issue.

Generally, a party that files a 12(b)(6) is limited to the four corners of the complaint. And if there's a contract incorporated or a document incorporated as an intrinsic part of the complaint, you know, that's usually considered under the 12(b)(6) motion.

What the Defendants did, what the debtor here did is they filed a bunch of evidence in their 12(b)(6), essentially attempting to argue it as a summary judgment. We raised that in our response. So as part of our response, we objected to all the evidence. But then on the reply, they filed a bunch more evidence both without leave and improperly, basically sandbagged us.

And so we raised two points for striking that evidence. One was akin to the first argument, which is it's not an evidentiary hearing. It's not an evidentiary process in the first instance. A 12(b)(6) motion has to assume that the facts pled are true, and then the question is whether they state a claim.

And, secondly, adding them to the reply is especially

egregious because the reply is the last word. And we didn't have an opportunity to respond, and we also don't think it's relevant nor should we have to respond to a whole bunch of extra evidence that was attached.

That's essentially the basis of our motion, Your Honor.

MR. POMERANTZ: Your Honor, the simple answer to the issue is we filed the reply of the appendix in connection with the motion to enforce the reference. We didn't file it in connection with the motion to dismiss. The motion to enforce the reference is moot. So what Mr. Sbaiti, his whole argument doesn't make any sense.

As a substantive matter, just there wasn't any evidence. It was pointing to court pleadings, orders, and stuff. So it's irrelevant. I don't know why it's still on the docket. It shouldn't be on the docket since it related to the motion to enforce the reference.

THE COURT: All right. Mr. Sbaiti, did you just simply --

MR. SBAITI: Your Honor, much of that evidence was --

THE COURT: -- misunderstand or what?

MR. SBAITI: I think we might have because it was filed as a separate item, and it may have been miscalendared or misapplied on our system. But the way it was presented to us when we got it was it appeared to be evidence in support of,

well, I guess both, but certainly evidence that was averted to in the reply.

But if they're saying that the Court's not going to consider it, then that moots the motion and I think we can move on.

MR. POMERANTZ: Yes, Your Honor. I had nothing to do with his motion. I guess there was another mistake on their end. I guess that stuff happens occasionally.

THE COURT: Okay. All right. So I'll deny it as based on a mistake that's been acknowledged here. And so with that, let's have an order cleaning that up, as well, Mr. Pomerantz, please.

With that, we'll move on to the Defendants' motion to dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris will be making this argument?

MR. POMERANTZ: That is correct, Your Honor.

THE COURT: All right.

Mr. Morris, I'll hear your argument.

MR. MORRIS: Good morning, Your Honor. John Morris for Pachulski Stang Ziehl & Jones for the reorganized debtor. Can you hear me okay?

THE COURT: I can. Thank you.

MR. MORRIS: Okay.

Your Honor, this is a bit like Groundhog's Day. I believe that we're going to spend the next half hour or an hour

discussing the very issues that were before the Court earlier this year on the HarbourVest 9019 motion.

As the Court will recall from the June 8 hearing, there is a complaint that's been filed ostensibly by the DAF and CLO Holdco. As Your Honor will recall, the testimony established that Mark Patrick had just been installed as the trustee, had no knowledge of the prior events, and Mr. Dondero and Mr. Sbaiti spent quite some time together formulating this particular complaint that is nothing less than a collateral attack on the Court's prior order.

I'd like to, if I can, just walk through a PowerPoint presentation to try to make the debtor's position quite clear, if I may.

THE COURT: You may.

MR. MORRIS: And I would ask my assistant, Ms. Canty (phonetic), to put up the first slide.

Your Honor, you'll recall that last December, the debtor filed its motion under Rule 9019 for court approval of a settlement. The debtor was completely and utterly transparent in what the terms of the settlement were.

Very briefly, as set forth in Appendix 2 or Exhibit 2 which was the motion itself, in Paragraph 32, Your Honor, the debtor set forth the terms of the transaction for which it was seeking approval. Those terms included in the very first bullet point a statement that HarbourVest shall transfer its

entire interest in CLOF to an entity to be designated by the debtor.

And that's an important point that we'll talk about in a number of different contexts, Your Honor. The debtor made it very clear at the very first moment of this matter that it was not going to acquire the asset but the asset was going to be transferred to an entity to be designated by the debtor. The debtor's motion filed last December clearly stated the value of the interest that it would be acquiring in return. That was also set forth in Paragraph 32 in a footnote.

It didn't say that it was the fair market value. It said the method of valuation was the net asset value and gave a valuation date of December 1st so that all parties in interest who received the motion understood the economics of the deal. And the deal that the debtor was asking the Court to approve was one whereby HarbourVest would receive certain claims and in exchange for those claims, they were going to transfer their interest in CLO -- HCLOF.

The debtor also filed on the docket for all to see a copy of the settlement agreement. The settlement agreement sets forth the terms of the deal, including again the statement that HarbourVest "will transfer all of its rights, title, and interest in HCLOF." It actually says to an affiliate or an entity to be designated by the debtor. And the transfer agreement itself was also put on the docket.

So that's where things stood just before Christmas. I know that there's some due process and other type arguments that are in the Plaintiffs' opposition to the motion. But, of course, the undisputed facts are that the debtor timely filed the motion. The time period was consistent with all applicable rules. Nobody ever asked the debtor for an extension of time. Nobody ever filed a motion for an extension of time. And so those due process arguments I think carry no weight at all.

So the debtor filed the motion. And if we can go to the next slide, we see what the responses were, and there were several. All of the responses, the only responses were objections to the motion filed by Mr. Dondero and his certain of his affiliated entities.

Mr. Dondero's objection can be summarized as follows. He made the following observations and asserted the following objections to the proposed settlement. The first thing he said is that the settlement far exceeds the bounds of reasonableness. Now, of course, one cannot make a determination of reasonableness without having an understanding of value. The debtor was giving something and it was getting something.

And so Mr. Dondero understood that the issue of value was front and center. If there was any mistake about it, he also noted that he understood that as part of the settlement and, again, I've written this incorrectly, HarbourVest will

transfer its entire interest in HCLOF to the debtor. That is not what Mr. Dondero understood. In fact, Mr. Dondero understood that it would transfer its entire interest in HCLOF "to an entity to be designated by the debtor," again, making it clear that he knew exactly what the debtor was doing here. And that can be found at Appendix 4 in Footnote 3 on Page 1 if you want the exact quote from Mr. Dondero's pleading.

In the same footnote, he also specifically acknowledges that he understood the valuation. He understood the method valuation. He understood the valuation date of December 1st. And he urged the Court in his pleading to scrutinize the settlement to make clear that the available value of the investment should be realized by the debtor's estate.

And this is such a critical point, Your Honor. His concern was that by placing the value in an entity other than the debtor itself, that the Court wouldn't have jurisdiction over that asset. That was his concern. So not only did he understand that the asset was going to be transferred to an affiliate, he wanted to make sure that this Court had jurisdiction over the asset.

And, of course, Mr. Seery in his testimony and otherwise, we provided the Court with all the comfort it needed to know that even though it was being assigned to a special-purpose vehicle wholly-owned by the debtor, it would

nevertheless be subject to the Court's jurisdiction.

Mr. Dondero's trusts also filed an objection if we can go to the next slide.

Dugaboy and Get Good represented by Douglas Draper made the following observations and asserted the following objections to the HarbourVest Settlement. They, too, made clear that they understood that the asset was going to be transferred to an entity designated by the debtor. They, too, acknowledge that they understood that the debtor was valuing the asset at approximately $22 million as of December 1st. And their objection was that the Court couldn't evaluate the settlement without knowing how the asset was valued, without knowing whether the debtor could acquire the asset, very critical point.

These are the points that are made in the complaint. These are the exact same points that are made in the complaint. And also the Court couldn't evaluate the settlement unless they understood that the value would be inure to the benefit of the debtor's estate, again, mimicking Mr. Dondero's concern that by placing the asset in an affiliate of the debtor, that it might not be subject to the Court's jurisdiction.

Finally, and most importantly, if we can go to the next slide. The Plaintiff, CLO Holdco, filed an objection to the 9019 motion. And this is just so critical. And this is the Groundhog Day aspect that I specifically speak of. CLO

Holdco's objection was based solely on its assertion that it had a superior right to the opportunity to acquire the asset that was being transferred by HarbourVest. It only made one argument in support of its contention that it had a superior right, but that argument was specifically premised on the membership agreement, Section 6.1 and 6.2 of the membership agreement.

CLO Holdco, the Plaintiff in the underlying action, argued to this Court that HarbourVest had no authority to transfer the asset without complying with the right of first refusal that would give CLO Holdco the opportunity to take the asset for itself. That's what this Court was told. CLO Holdco didn't make this argument fleetingly. They provided an extraordinarily detailed analysis of Sections 6.1 and 6.2 of the membership agreement and concluded "that HarbourVest must effectuate the right of first refusal before it can transfer its interest in HCLOF. That was the objection. Objections have consequences, as Your Honor knows.

If we can go to the next slide.

By filing an objection, CLO Holdco and the trusts and Mr. Dondero became participants in the litigation. Notwithstanding the Plaintiffs' arguments to the contrary, when they file the objections, they participate in what's called a contested matter. And in a contested matter, they had every right to take all discovery on any issue that was related to

the 9019 motion, including the transfer, the disposition of the asset to an affiliate of the debtor, the valuation of the asset that's being received, the merits of the settlement itself, the causes of action, whether, you know, what communications that were, the negotiations, what did Mr. Seery and Mr. Pugatch discuss? Right?

They could have taken any discovery they wanted. And they did avail themselves of discovery, in fact. They did -- I don't know why they did what they did, but they chose to take one deposition, and that was Mr. Pugatch, okay.

His deposition transcript, I think is at Exhibit 7, or Appendix Number 7, and it was a long deposition. It really was. And they asked Mr. Pugatch at the deposition if he knew what the value of the asset that was being transferred was. And he said $22.5 million. So it wasn't just Mr. Seery or the debtor who was subscribing to this valuation. The party on the other side of an arm's length negotiation was subscribing to the exact same valuation.

The Plaintiffs could have taken whatever discovery they wanted. This is a full and fair opportunity to participate in the litigation. We proceeded to trial. Before we got there, actually, the debtor filed its response to CLO Holdco's objection and proffered its own very detailed and apparently very persuasive analysis that CLO Holdco's objection was without merit, that CLO Holdco had no right of first

refusal under the facts and circumstances as they existed, and with Grant Scott, Mr. Dondero's childhood friend at the helm, we got to Court for the contested hearing on the debtor's 9019 motion, and CLO Holdco withdrew their objection.

And I've put up on the screen just an excerpt of the transcript because, you know, when we talk about whether or *res judicata* should apply, because was there a hearing on the merits? Was there a decision on the merits? Just look at the words of CLO Holdco's lawyer. "CLO Holdco has had an opportunity to review the reply briefing and after doing so has gone back and scrubbed the HCLOF corporate documents based on our analysis of Guernsey law."

And some of the arguments of counsel in those pleadings and our review of the appropriate documents, counsel obtained the authority from Mr. Scott to withdraw the CLO Holdco objection based on the interpretation of the member agreement. We were grateful for that and the Court specifically said in response, "That eliminates one of the major arguments that we had anticipated this morning."

Apparently, the Plaintiffs believe that those events have no meaning and that this Court's reliance on CLO Holdco's substantive withdrawal of its objection has no meaning. I think they're wrong, and we'll get to that in a moment.

We proceeded with the hearing. Mr. Seery and Mr. Pugatch testified at length. If you look at Footnote 3,

you'll see Mr. Seery testified for almost 70 pages of testimony. Mr. Pugatch testified for almost 45 pages of testimony. His testimony was exhaustive. And, again, any of the objecting parties had the right to ask whatever questions they want.

But I do want to just note a few things that aren't up on the screen right now. If you go to Appendix 9, Your Honor, which is the transcript of the hearing, at Page 13, you will see that the very first thing I discussed in my opening statement was the economics and how with a valuation of $22.5 million this deal made sense for the debtor.

You will see from Pages 30 to 42 there is extensive testimony from Mr. Seery about the amount and the value of the asset. But the most important part of Mr. Seery's testimony is that he explains how it came to be that HarbourVest agreed to transfer its interest in HCLOF to an affiliate of the debtor. And that came about, not because Mr. Seery or the debtor was initially at all interested in doing this. The whole idea originated with HarbourVest.

They wanted to extract themselves from the Highland platform. They wanted to give this piece up. So there's no conspiracy going on here. The unrebutted testimony that all of the objecting parties had an opportunity to challenge was that the whole idea originated with Mr. Pugatch and with HarbourVest. I think that's an important point to take into

account.

And finally, again, from the hearing, if you look at at Appendix 9, you'd also find that Mr. Pugatch, again, testified, as he had in his deposition, as to the value of the interest being transferred. So we completed the testimony. We rested our case having had a full and fair opportunity to contest the motion. The objecting parties rested as well. And we got to the point where we had to prepare the notice, and we were discussing that at the hearing, if we can go to the next slide.

And it's very important, because again, this was all done transparently, and it was all done on the record. And after the close of evidence, I addressed the order that was going to be prepared. I specifically said that I wanted to make clear that we were going to include a provision, "that specifically authorizes the debtor to engage in, to receive HarbourVest the asset, you know, the HCLOF interest," right. I wanted everybody to know that was what was going to happen, and then I said, "The objection has been withdrawn." I think the evidence is what it is and we want to make sure that nobody thinks they're going to go to a different court somehow to challenge the transfer. But yet, that is exactly what the complaint seeks to do.

Having put everybody on notice as to where we were going, as to what the evidence showed, the debtor drafted and

the Court adopted an order, and the order says, among other things, that HarbourVest was authorized to transfer its interest to the debtor. Actually, it says, "to a wholly owned and controlled subsidiary of the debtor," pursuant to the transfer agreement, "without the need to obtain the consent of any party or to offer such interest first to any other investor in HCLOF." So the Court heard the 9019 motion pursuant to a Bankruptcy Rule and entered and order that was unambiguous and that the Plaintiffs did not appeal from.

We can go to the next slide.

At a very high level, Your Honor, it is just crystal clear that the complaint is just inextricably intertwined with the 9019 proceedings and the order itself. I think Mr. Sbaiti would agree with me that but for the order that approved the transfer of the asset and the testimony about the value of that asset, they have no claims.

Every single claim is predicated on what happened in the 9019 hearing. Every single claim is predicated on the Court's order approving the transfer of the asset and the testimony and evidence that was adduced in relation to that asset.

There were really only two issues that the Court -- I mean, if you want to think about it at its most simplistic level, the Court was being asked to assess, is it fair, is it reasonable, is it legally permissible for the debtor to give

something. In this case, allowed claims and releases, and to get something in return. In this case, HarbourVest's interest in HCLOF and releases in return. And that is really the gravamen of the complaint.

The complaint is based whether it's breach of fiduciary duty or RICO or breach of contract or tortious interference, whatever the claim is, none of them exist if the debtor doesn't get this. They just don't exist. And that is why the complaint and the proceeding are inextricably intertwined. And if you just take a look at just one paragraph of the pleading, it says at the core of this lawsuit is the fact that HCM, that's the then debtor, purchased the HarbourVest interests in HCLOF for $22.5 million knowing that they were worth far more than that. There's not a cause of action that exists in the complaint that isn't dependent on Paragraph 36.

So if we can go to the next slide with that background, I'd like to argue why under 12(b), the complaint should be dismissed because the claim should be barred under the doctrine of *res judicata*. Luckily, Your Honor, there is at least one area of agreement between the parties here, and that is the purpose of the doctrine and the elements that have to be satisfied in order to meet the burden of proof necessary to have the claims barred. And in Footnote 1, you can -- I've tried to just be helpful to the Court to show that we may not

cite to the exact same cases, but the parties agree that the doctrine is intended to foreclose the re-litigation of claims that were or could have been raised in a prior action and that there's four elements that have to be satisfied for the doctrine to apply.

The parties have to be either identical or at least in privity, the judgment in the prior action had to have been rendered by a court of competent jurisdiction. Number three, the prior action had to have been concluded by a judgment on the merits. And the last one is that the same claim or cause of action was involved in both suits. So I just want to spend a few minutes now, Your Honor, going through those four elements to show the Court how easily the reorganized debtor meets this standard.

If we can go to the next slide, I can take care of the first two elements very quickly.

The first element, the debtor asserted that the Plaintiffs were parties or in privity with parties to the prior proceeding. That's at Paragraph 17 of the motion to dismiss. The debtor relies on the deposition testimony of Grant Scott, who was then the trustee of the DAF.

CLO Holdco is a wholly-owned subsidiary of the DAF, or wholly controlled, in any event, and Mr. Scott's testimony was that he was the only director and there were no employees of either entity. So we, in our motion, put forth evidence to

establish the first element, and I don't believe, maybe I've missed it. I don't believe that the Plaintiffs have contested that element. If they have, I think Mr. Scott's testimony will carry the day, in any event.

The second element as to whether or not a court of competent jurisdiction is the entity or the court that rendered the ruling. Of course, that's been met, too. The Plaintiffs, in their opposition to the motion to dismiss, suggested that the bankruptcy court would have lacked jurisdiction if their cross motion to withdraw the reference was granted. They said if the district court decides that mandatory withdrawal applies, then it cannot find that the bankruptcy courts already entered final judgment was rendered on Plaintiffs' causes of action and had jurisdiction to do so. I think that's just a clear misstatement of the law.

But in any event, Your Honor, at this point, I believe it's irrelevant because the district court, in fact, sent the case back to Your Honor and back to this Court. And so, at the end of the day, Plaintiffs' argument doesn't hold water because of the district court's ruling, which can be found -- the order of reference can be found at Docket Number 64. And so I think that easily takes care of the second prong.

The third prong is whether -- if we can go to the next slide -- the prior proceeding resulted in a judgment on

the merits. And this is really the critical point, Your Honor. As the Court knows, the whole doctrine of *res judicata* is designed to prevent, as the parties agree, the re-litigation of claims. Stated another way, it's to bring finale. It's to make sure that the Court doesn't hear the same claims and the same issues that either were brought or that could have been brought in a prior proceeding. And so, we believe that we easily meet the standards set forth in the third prong. The 9019 order necessarily determined that the *quid pro quo* that I described earlier was fair, reasonable, and legally permissible.

Notwithstanding their assertions to the contrary, the Plaintiffs are most definitely seeking to unwind at least one half of the Court's order by belatedly claiming that they are entitled to the benefit of the bargain while leaving Highland burdened, frankly, with the claims that HarbourVest got as part of the deal. I will tell you, Your Honor, and this is argument, the debtor would never have asked for, and I don't believe that the Court would ever have granted, the 9019 motion if they thought that there was a risk in the future that Highland wouldn't get the benefit of the bargain and it was incumbent upon CLO Holdco and the DAF, and frankly, any party in interest, to stand up and be counted and tell the Court and the debtor, why the debtor was not entitled to do this deal and CLO Holdco did that. They actually did.

They stood up and they filed an objection and they said we have a superior right to this asset in the form of a right of first refusal. They wound up folding in the face of persuasive argument, and I respect the lawyer who did that. I just do. But that was the time to speak up, and that's why it is on the merits because that is exactly what *res judicata* is intended to do. It's intended to have everybody put your cards on the table. You don't put one card on the table and say, I'm going to challenge this under 6.2 of the members agreement, but I'm not going to tell you that I also think you owe me a fiduciary duty under the Advisors Act or as the control party or under any other theory that they had. They can't do that. That's exactly what the problem is here.

If we can go to the next slide. Is it a judgment on the merits? The debtor and the Court relied on CLO Holdco's representation that it was withdrawing its argument, its claim, its contention, its assertion that it had a superior right to obtain the HarbourVest interest in HCLOF. Again, they did so not whimsically, not because Mr. Kane was going to be out of town and he couldn't make the hearing. He did it after, and I don't think this matters frankly, but I think it's worth noting that he did it after an extremely careful analysis. I would tell you, Your Honor, that -- well, I would argue, Your Honor, that even if Mr. Kane at CLO Holdco had never filed an objection, if they'd never filed -- if they'd gotten notice

that this was happening and they sat silently, that would have been enough for *res judicata* because the issue before the Court was whether it was legally permissible for the debtor to acquire this asset.

And if they had an obligation, if they owed a duty to another party, it wouldn't have been legally permissible. And if somebody believed that it wasn't legally permissible because a duty was owed to them, they had an obligation to speak up. And so I think it's very important, particularly for the collateral estoppel argument that I'll make in a moment, that CLO Holdco did in fact file an objection. It was based on the breach of contract claim that's in their complaint. It's the exact same claim. And they withdrew it. I think it's very, very important. I think it highlights why *res judicata* applies. I think it is the linchpin of the collateral estoppel argument.

But at the end of the day, I think if they say nothing, they should be estopped or precluded under *res judicata* from now asserting -- it would be like -- I was thinking about this earlier, Your Honor. If you'll remember earlier this year, Mr. Dondero and his entities have kind of a habit of withdrawing objections at the last minute. We had a couple of sale hearings earlier this year. And the issue was valuation, you know, and the process, and could the debtor meet its burden of proving that the sale outside of the ordinary

course of business was in the debtor's best interest. And they sold that restaurant. And Mr. Dondero objected. And at the last second, they withdrew the objection. Did they sue tomorrow? Does Your Honor really think that they could bring a lawsuit tomorrow and say they just found a document or theory on which the debtor had an obligation to give them a right of first refusal, even though we've already closed on the transaction, even though they were given notice of the transaction, even though they filed an objection to the transaction, even though they withdrew the objection? Would the Court tolerate for one second a new pleading tomorrow from Mr. Dondero that the debtor actually had a fiduciary duty to give him a right of first refusal to buy that asset under whatever theory, just because he pleads it and the Court has to accept as true the allegations in the complaint? I think not. And I think it's worth thinking about that to highlight just how -- just how wrong this is.

Continuing on. You know, the Plaintiffs in opposition say it can't be a trial on the merits because we weren't parties. Of course they were parties. Again, they filed an objection. They were the parties to the contested matter, full stop. They rely on a case called Applewood and they say, this is the very first point they make in their brief. Applewood, if it wasn't *res judicata* in Applewood, how could it possibly be *res judicata* here? But the facts are just

so inapposite, right?

In Applewood, you had a garden variety plan and release where the debtor and the officers and directors got a discharge. No objection to it. And a secured lender later on sought to sue guarantors who happened to be officers and directors. And the court, not surprisingly, said that the confirmation order wouldn't prevent the secured lender from going after the officers and directors, not in their capacities, as such, but in their capacity as guarantors, which were never part of the confirmation order. That just doesn't apply here because here, we have the debtor making a motion before the Court in which it sought permission and authority to acquire a particular asset. Anybody who had a claim to that asset should have stepped forward and put their cards on the table.

And again, CLO Holdco put their cards on the table and they lost, and they folded. To use the poker analogy, they folded. And to hear them come into Court today and say we're going to sue you because I reshuffled the deck, it's not right and Applewood has no relevance.

Finally, Your Honor, you know, it's not on the merits, they say, because you know, Mr. Seery and the debtor hid the true value of the asset, and had we only known the true value of the asset, we would have made all of these other claims. The fact of the matter is, you either have a fiduciary

duty or you don't. And if you had a fiduciary duty, they should have spoken up and they did only under 6.2, but they did.

But here's the important part, Your Honor. Take the allegations as true. You have to take all of the allegations as true, not just some of them. And if you look at Paragraph 127 of the complaint, and I would ask Ms. Canty to go to Appendix 11 and let's just put Paragraph 127 up on the board.

Here's the irony of the whole thing, right. The whole complaint is based on the fact that somehow Mr. Seery was engaged in insider trading. They accused him of insider trading, and they say he didn't disclose the full value of the asset. Just read Paragraph 127. James Dondero, who was on the board of MGM, is the tippee. You've got an insider trading case -- I mean, I don't represent MGM. I'm not with the SEC. I don't know why Mr. Dondero thought he should be telling Mr. Seery in December, 2020. It's not clear if it was before or after the 9019 motion was filed. But Mr. Dondero is the very source of information -- you can't make this up. He's the very source of the information that he now complains Mr. Seery didn't disclose.

Of course, Mr. Dondero, the trust, CLO Holdco could have asked Mr. Seery at any time, how did you come up with your valuation? Mr. Dondero, knowing that he had supplied to

Mr. Seery, according to Paragraph 27, please take it as true for purposes of this motion only. He's the source of the inside information. And now he has the audacity to come to this Court, notwithstanding the Court's approval, all of the time and money and effort spent in the 9019 process, and say, Mr. Seery was wrong because he didn't tell CLO Holdco and the DAF about the information that Mr. Dondero gave to Mr. Seery. It's not right.

It was a judgment on the merits. And if Mr. Dondero or the DAF or CLO Holdco or the trust wanted to challenge the valuation, they had every opportunity to do so. And based on Paragraph 127, if the Court accepts it as true, shame on them. Shame on them for not pursuing this issue before. The guy gave Mr. Seery, according to this allegation, and I'm just going to leave it there, inside information. And he sits there in silence, right? It says, look at the last sentence: "The news of the MGM purchase should have caused Seery to revalue HCLOF's investment." Seriously?

The third element is (indiscernible). The fourth element, if we can go to the next slide.

Are they the same claims? Did the claims arise from the same set of operative facts? I've addressed this pretty clearly already, so I don't want to belabor the point. But obviously, both the 9019 motion and the complaint arise solely from the debtor's settlement with HarbourVest. The debtor's

acquisition of HarbourVest's interest in HCLOF and the debtor's valuation of that interest. Without those three facts, there is no complaint. It's just not credible to argue that the fourth element is not met.

The case law is clear. It's quoted in the Plaintiffs' opposition. It's not just the test of whether the claims are the same. It's whether the claim is the same as that which was brought or could have been brought.

In their opposition, the Plaintiffs contend that the claims "did not write them until after the settlement was consummated," and that the first time the plaintiffs heard about the valuation of HarbourVest's interests was at the January 14, 2021, hearing. I think I quoted that. If you look, I don't know if it's Page 10 or Paragraph 10; the way I wrote it, it's probably Page 10. I think that's a quote right out of there. But of course, as we saw the debtor disclosed the valuation in its very initial motion, CLO Holdco's counsel elicited valuation testimony directly from Mr. Pugatch, so that was before the hearing.

And of course, Mr. Dondero and the trusts both cited in their objections the valuation. The notion that this was not right, just -- it's contradicted by their own conduct, their objections, their questions in deposition, the information that was contained in the motion that they objected to.

I do want to go off-script for just a minute, if we could just take that down because I know that this is probably something that Mr. Sbaiti may argue. And that is, well, gee, but you have to take the allegation as true that Mr. Seery wasn't honest, that Mr. Seery lied to the court. I don't understand why there's not a fraud cause of action in there, but there's not. But that's their theory.

And gee, how does he get to skate away Scott free if he's allowed to do that with impunity, right? I will tell you, Your Honor, of course you've seen Mr. Seery many times. You've made your own assessments of his credibility. I'm not here to argue the merits, but I will just say that the Defendants, if ever forced to, will contest the allegation.

But here's the thing, and here's the important point about, you know, whether or not he could lie with impunity and say, I suspect that's where Mr. Sbaiti is going to want to go.

Mr. Seery said what he said. And he had a reason to speak, and he spoke, and he said what he said and he told everybody who would listen exactly what he was doing and how he was doing it. For whatever reason, the objectors put the valuation front and center. It's right in their objections. They noted the objections. But for whatever reason, they did nothing.

Whether they were negligent or whether they were lying in wait is kind of irrelevant. They had a full and fair

opportunity to contest this issue. And if they had done so, and the evidence proved what they're now alleging, they can't tell you what would have happened. So, you know, HarbourVest may have taken a different position. The Court may have done something.

We're never going to know now because Mr. Seery and the debtor are getting away with something, but because they put in evidence that went unchallenged by Mr. Dondero and the Plaintiffs. It simply went unchallenged. And they say, oh, gee, that's because we didn't know. Well first of all, you didn't ask. And second of all, again, the source of the inside information, the reason that Mr. Seery should have known the asset was worth more. The reason that he should have refrained from trading and not engaged in insider information was Paragraph 127. It was Mr. Dondero.

Here's another thing. If -- if again Mr. Seery had not been honest with the Court and that was ever brought out, Maybe HarbourVest -- maybe HarbourVest would have had a right to complain. There's a lot in the complaint about oh, HarbourVest was misled. The actual evidence that's in the record, and this is part of res judicata, Mr. Seery testified very clearly to the arm's length negotiation that took place. He told the Court under oath that the negotiations were contentious.

He told the Court under oath that in order to try to

resolve the case, he and Mr. Pugatch went off and had their own private conversation without lawyers. They could have taken discovery on any of that, right. What did you guys talk about? It's certainly not privileged. They had every opportunity. But what we do know is that Mr. Pugatch under oath, in deposition, and at trial, said the value is $22.5 million.

So I don't think Mr. Pugatch or HarbourVest is ever, ever, every going to complain about the transaction they did. Because of what the evidence simply shows. But again, you've got the Plaintiffs in their complaint saying that somehow the debtor and Mr. Seery in negotiating this transaction has now exposed the debtor to liability. It just makes no sense.

So there was a time and there was a place to challenge Mr. Seery. Somebody, you know, maybe HarbourVest could have done something, maybe they could still do something. I don't know. If they really think that there's a problem, maybe we'll hear from HarbourVest someday. But the Plaintiffs have no right to complain. They just don't. They knew everything. They were the source of the inside information. They sat on their hands, and they shouldn't be allowed to do what they're doing now.

If we can go to the next slide. I want to move to the next theory and try to finish this up. The next theory is that the Plaintiffs' claims are barred by judicial estoppel. The judicial estoppel argument is really, really very

straight-forward. And it's important because if the Court thinks about this the way I do, it's that the whole issue of valuation is completely irrelevant to the Plaintiffs unless they can show that they were owed some kind of duty, that they had some superior right to acquire the asset. But that's exactly the issue that CLO Holdco relied upon and withdrew and should now be estopped from pursuing. Right.

The legal standard, again the parties agree on, that in order to be estopped, the party must take an inconsistent position. And the party must have convinced the Court to accept that position. Again, both prongs are easily met here in just a few sentences from the January 14 hearing. You have Mr. Kane saying that he understands and acknowledges and admits that they have no superior right to the investment. And the Court relying on that very representation in declining to conduct a hearing and render a ruling on the merits of the claim that was withdrawn. The objection that was withdrawn.

And for the avoidance of doubt, after Mr. Draper spoke on behalf of the Trust, the Court, at Page 22 engaged in the following colloquy. The Court asked Mr. Draper:

"THE COURT: Were you saying that the Court still needs to drill down on the issue of whether the debtor can acquire HarbourVest's interest in HCLOF.

"MR. DRAPER: No.

"THE COURT: Okay. I was confused whether you were

saying I needed to take an independent look of that. Now that the objection has been withdrawn of CLO Holdco, you're not pressing the issue.

"MR. DRAPER: No. I am not."

Okay. You can call it res judicata, you can call it judicial estoppel, collateral estoppel, the two prongs are easily met. They're taking an inconsistent position today and through all kinds of different theories, including the one that they withdrew, the Plaintiffs assert that they had a superior right to acquire the interest from HarbourVest.

And they should have asserted those rights at the hearing. That was the time. And they should be estopped now from taking a completely inconsistent position from the one that was before the Court. And I just do want to point out, the statement from a case called Hall vs. G.E. Plastic. And it's interesting, Your Honor, because there's only a few cases that I focused on, because this is really more fact intensive. And there isn't a dispute as to the, you know, the elements of these matters.

But it is interesting that the Plaintiffs, you know, generally ignore all of the cases that we cite to. One which is Hall vs. G.E. Plastic, where the Court said that the focus on the prior success or judicial acceptance requirements is to minimize the degree of a party contradicting a Court's determination, based on a party's prior position. That's the

whole point of the exercise. You can't do this. You can't do this.

Just quickly, that leaves the individual arguments as to each of the five causes of action and I just want to go through some highlights. There's a negligence claim, Your Honor. And we did not file a pleading, but the Court can certainly take judicial notice of the fact that the effective date has occurred. Under the effective date, the plan is now effective. That includes the exculpation clause, as Mr. Pomerantz, I think accurately and without contradiction pointed out earlier, the exculpation clause applies specifically to the debtor and to negligence claims. And that's not a matter that's at all subject to appeal.

So I think just to add to the arguments that we have in our papers, which I adopt and do not abandon for any purpose, I would add to the argument on negligence, that it's now precluded, as a result of the plan becoming effective.

The fiduciary duty count suffers from numerous defects. I just want to point out a couple of them. They don't respond to the argument under Corwin, that under the Advisor's Act, there is no private right of action to sue for damages arising from a breach of fiduciary duty. This claim rears its head in virtually every single complaint. They've never addressed Corwin. Corwin is binding on this Court, and it is unambiguous that there is no private right of action to sue for damages for

breach of fiduciary duty under the Advisor's Act.

They ignore Goldstein. Goldstein is not from the Fifth Circuit, but it's very persuasive authority that advisors do not owe fiduciary duties to their individual investors. Instead, they owe fiduciary duty to their client. Their client is the entity with whom they're in contractual privity. And so in this case, there's no fiduciary duty there, either.

The breach of contract claim. Again I just -- I would just say quickly, Your Honor, it's barred under judicial estoppel. Even if it wasn't, it's clear based on Mr. James' analysis and admission that the debtor's, or the reorganized debtor's interpretation of 6.2 is accurate. And you know, I said this in the beginning. Now let me tie it in a bow because the breach of contract claim, and the tortuous interference claim are both tied to the same thing. And that is the assertion that the Plaintiffs had a right under the membership agreement, a right of first refusal.

And they basically say that the debtor was playing games. That they shouldn't be able to get through 6.2 by assigning it to an affiliate. And that's where I go back, Your Honor, and just remind the Court that the debtor told the whole world exactly what they were doing in their motion. And their objections, Mr. Dondero and the Trusts both acknowledge to the whole world that they understood exactly what was happening.

In fact, their concern was not that it was going to

the debtor, but that it might be going to an affiliate outside of the bankruptcy court's jurisdiction. And for them to now say, having taken all of those positions -- talk about inconsistent positions. They should be barred from saying today, that the use of an affiliate to effectuate the transaction was wrongful, because they actually told the Court that they needed to -- that the Court needed to make sure that it had jurisdiction over the very entity they now say somehow shouldn't have been allowed to get the asset.

It's a bit much. So that takes care of the tortuous interference.

The RICO claim, Your Honor, again is a motion. There's so many different aspects to it. But I don't think the Court needs to get past the Supreme Court holdings in HJ, Inc. Again, just simply ignored by the Plaintiffs in their opposition to the motion to dismiss. In HJ, Inc., the Court -- the Supreme Court did an exhaustive analysis to try to determine and ultimately did determine, what a pattern of racketeering activity meant. And the Supreme Court came to the following formulation. That it had to have two or more predicate related offenses that amounted to a threat of continued criminal activities.

You know, the notion here is that the debtor and Mr. Seery engaged in insider trading. We've already -- I've already mentioned that according to the complaint, which the

Court can take as true. Mr. Dondero, himself, was the tippee. But be that as it may, they don't come close to meeting the very high standards set forth by the Supreme Court in HJ, Inc. to show that whatever conduct Mr. Seery and the debtor engaged in, and if you take the allegations as true, in not telling what the fair value of the asset was, that that doesn't amount to a hill of beans for purposes of RICO. That you don't have any, I think predicate acts. I think here's the Court, predicate acts extending over a few weeks or months, threatening no future criminal conduct, do not meet RICO pleading grounds. Right.

Security fraud claims cannot be predicate acts for purposes of RICO. That is also clear. And that is really, I mean they say mail, wire and fraud. But what's really at heart is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr. Seery being -- I mean Mr. Dondero being the tippee. But those are just some of the reasons.

None of, you know, that the RICO claim fails. You know, I'll otherwise rely on the papers, unless the Court has specific questions as to any of the other pieces of the motion to dismiss the RICO claim, or any other aspect of the Defendants' motion. I think this is clear. I think we win, no matter how you slice it. It's just wrong. It's just wrong.

This Court will never, ever have a final order if Mr. Dondero is able to engineer complaints such as this, which seek

to assert claims that absolutely positively could have and should have been brought at the time the debtor made its motion.

Unless the Court has any questions, I have nothing further.

THE COURT: I do not. All right.

Mr. Sbaiti, I'm going to let you have as much time as Mr. Morris. He took 55 minutes. As I mentioned, I have a hard stop at 12:00 to do a swearing in ceremony. So if you're not finished in 40 minutes, then I'm going to have to take a break and come back and let you finish. All right?

MR. SBAITI: Thank you, Your Honor. Although I don't think I'm going to be much longer than 35-ish minutes.

THE COURT: Okay.

MR. SBAITI: if not less.

THE COURT: Okay.

MR. SBAITI: I think you'll be able to be done by -- we'll be able to be done by noon.

THE COURT: All right. Thank you.

MR. SBAITI: Thank you, Your Honor. Your Honor, may I share my screen?

THE COURT: You may.

MR. SBAITI: Thank you, Your Honor. Do you see my Power Point, Your Honor?

THE COURT: I do.

MR. SBAITI: Thank you, Your Honor. I don't know what which one you see. Is it the --

THE COURT: I see presentation.

MR. SBAITI: With the full page?

THE COURT: Yes, uh-huh.

MR. SBAITI: Okay, yeah, great. I just want to make sure we're on the right page. Thank you, Your Honor. So Your Honor, the defendant debtor is a registered investment advisor. And it all begins with that. And this where the distinctions between what happened in the 9019 and I'll get to the elements of res judicata through argument.

But the first thing that has to be identified is that the Defendant is a registered investment advisor. The objection filed by Holdco back during the 9019 was an objection against HarbourVest selling its interest by filing the right of first refusal. It did not deal with the investment advisor feature of Highland's relationship. And I'll get to why the 9019 doesn't preclude these arguments today.

This is essentially the structure. Highland was the investment advisor of HCLOF, and Holdco is an investor in HCLOF. And so Highland would owe a fiduciary duty under the Advisor's Act against -- to CLO Holdco.

Highland also had a direct advisor relationship with the DAF. And so under the Investment Advisor's Act, it owed fiduciary duties to both of those entities. The law governing

registered investment advisors is that it's a federally recognized and defined fiduciary duties. The fiduciary duty to there's a fiduciary duty to affirmatively keep the advisee informed and the fiduciary duty not to self-deal, i.e., not to trade ahead of an advisee and opportunity that an advisee would want or expect and without the advisee's expressed informed consent.

This is a federally recognized and defined fiduciary duty and it's actionable under state fiduciary duty laws. While Mr. Morris ended his argument by saying we didn't deal with their case law saying that there's no private right of action under the Advisor's Act, the fact of the matter is that Judge Boyle, about ten years ago, found that a state -- the breach of fiduciary duty claim can be predicated on breaches of federally imposed fiduciary duties under the Advisor's Act. And that's what Douglass v. Beakley held. And that's actually what we cited in our response. So I'm not sure why he would argue that we haven't addressed the issue of where does this private right of action come from.

Federal Law supplies the rules of the relationship and State Law provides the cause of action for those breaches. Now the scope of that has been expounded upon by many cases. The Fifth Circuit held in Laird, as a fiduciary, the standard of care to which an investment advisor must adhere imposes an affirmative duty of utmost good faith and full and fair

disclosure to all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients.

The word "affirmative" there is important because it means the investment advisor is not supposed to wait to be asked. The investment advisor as an affirmative duty to proactively provide the information to the client.

The next standard comes from the SEC. We call it the SEC interpretation letter. It's a release that came out in 2019. And to meet it's duty of loyalty, an advisor must make full and fair disclosure to its clients of all material facts relating to the advisor relationship. Material facts relating to the advisor relationship include the capacity at which the firm is acting with respect to the advice provided.

The SEC had another release in 2000 -- or excuse me, in that same release, the SEC said the duty of loyalty requires that an advisor not subordinate its clients interests to its own. In other word, an investment advisor must not place its own interest ahead of its clients' interests. An advisor has a duty to act in the client's best interest, not its own.

The SEC general instruction three to part 2 of Form ADV, that every investment advisor has to pull out. And this is cited in our papers. As a fiduciary, you must also seek to avoid conflicts of interest with your clients, and at a minimum, make full disclosure of all material conflicts of

interest between you and your clients that could affect the advisor relationship. This obligation requires that you provide the client with sufficiently specific facts, so that the client is able to understand the conflicts of interest you have, and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.

And, finally, the Third Circuit in Belmont said:

"Under the best interest test, an advisor may benefit from a transaction recommended to a client if, and only if, that benefit, and all related details of the transaction are fully disclosed."

These fiduciary duties are unwaivable by the advisor. Any condition, stipulation or provision binding any person to waive compliance with any provision of this subchapter, or with any rule, regulation or order thereunder shall be void.

So the lawsuit does not allege that the HarbourVest settlement should be undone or unwound. I'd like to move to that point. Mr. Morris says well, you have to unwind half of the settlement. Maybe HarbourVest doesn't have to give back what it got, but Highland would still be saddled with the cost of the settlement, but not with the benefit of the settlement.

Well, actually that's not true. There's two points that we would make on that. Number one, our suit is a suit for damages. In other words, the suit would be a suit for money damages, based on the difference between the value of the asset

and what HarbourVest or what the actual value of the asset that was represented, $22.5 million. So the second point, though, is that even under a situation where CLO or Holdco or the DAF, or even HCLOF were to purchase the HarbourVest suit, the expectation would obviously be that they'd pay the $22.5 million that Highland paid for it.

So Highland is -- so it's not unwinding, and there's no saddling Highland with a burden that they didn't otherwise have, I think that's a misrepresentation. But we're not seeking to unwind the lawsuit -- or excuse me, unwind the settlement.

Now Mr. Morris is correct, the representation of value by Mr. Seery is -- is one of the main points here. And the representation was that the value of the entire asset. Not just the shares of MGM, but the value of the entire asset was $22.5 million. So in other word, nearly half of HCLOF was represented to be worth $22.5 million. It was argued by counsel on Page 14 of the January 14th transcript, and then on Page 112 of that transcript, Mr. Seery specifically says the current value is right around $22.5 million.

Now that was also in some of the filing papers and Mr. Morris put up the evidence to Your Honor that Mr. Pugatch, on behalf of HarbourVest also parroted that number. But there's not any evidence today about where that number came from, or whether he was simply relying on Highland's

representation of that value.

Now as a general rule, in these 12(B)(6) motions, as I said before, we don't look at the evidence because the whole point of discovery is to find out what's behind a lot of the evidence. That's been quoted. The amount of evidence that went into the 9019 motion as not necessarily full-blown discovery.

I understand Mr. Morris saying well, they could have asked the question. But as I just showed you, they shouldn't have to ask the question. There should be fair and full disclosure of all the material facts. And if it turns out, which we believe it is true, that by January, the value of HCLOF was twice what it was represented, or the HarbourVest portion of HCLOF was twice as to what it was represented, that's a material omission that Highland had an affirmative duty to not misrepresent. Irrespective of the questions being asked.

The DAF found out later on that the representation of the value wasn't true. Now Mr. Morris talked for a very long time about all the opportunities that somebody, Mr. Dondero, somebody other than CLO Holdco. In addition to CLO Holdco, could have asked the magic question to find out whether or not they were telling the truth. But that runs right in the face of the standards set forth by the SEC and by the Courts as to the affirmative obligation of an advisor to disclose all the

material benefits that they're going to get as part of a trade. The idea being that when you're a registered investment advisor and you want to engage in a transaction, you make a full disclosure and say this is the transaction. It's worth 41, but I'm paying 22-1/2. But here's why I'd like to be able to do it. And then that's the discussion that happens.

That clearly didn't happen here. And when it turned out that there was this entirely huge upside that they were gaining the benefit of, and maybe HarbourVest didn't care, that that was a false statement. Now the reason we don't have a common law fraud claim, or that we don't necessarily hang our hat on a fraud claim is we don't have enough evidence as it stands today, to specifically say that Mr. Seery intentionally misrepresented that. Although we believe that it was grossly reckless of him to do so. But we don't really need a fraud claim with a gross recklessness standard. We have a breach of fiduciary duty, which basically gets us to the same place.

So the timeline we have is September 30th was the last valuation of HCLOF assets provided by HCMLP. And the value of HCLOF, at that time, or the HarbourVest of that value, would have been about 22.5 million. So what it appears to be is that in January or in late December, the valuation that was being done -- what was being reported, wasn't the current valuation. It was the valuation as of the end of the third quarter of 2020.

On December 22nd, the motion to approve the settlement with HarbourVest was filed. HCMLP should have had or would have had up-to-date valuations of the HCLOF assets, but didn't necessarily disclose them as being different than the 22.5 million. On January the 14th, Your Honor, held the 9019 hearing. And then that same day, Your Honor entered the approval order.

And finally, in March, the DAF learns the true value of HLOF assets as of January 2021 and starts to look into it. Now Mr. Morris makes much of the fact that well, Mr. Dondero at least knew that he had tipped them off, Mr. Seery. And if you actually read Paragraph 127, you'll see specifically what it's purported that he said. He said stop trading in the MGM assets, because MGM might be in play. So you can't trade because I'm an advisor, Mr. Dondero's an insider, he's the tipper, not the tippee. Mr. Seery becomes the tippee under that theory of the case, and he has to, and is required to, because of their affiliation at the time, he's required to cease trading. And that was the purpose of saying that.

The collateral issue that we point is that he at the very least knew about that, and that should have caused him to revalue, if he hadn't done so at the time. Not that, knowing that alone is sufficient to know what the value of HCLOF actually was on that date. That's a complete misrepresentation of the point and purpose of that allegation.

And as Your Honor knows, under 12(B)(6) jurisprudence, the way this is supposed to go is we get the benefit of every inference based upon the allegations, not the movant. So the first violation is that the debtor as an IRA failed to affirmatively disclose the true current valuation of HCLOF and failed to keep the DAF and CLO Holdco reasonably informed of the value of the assets.

And the debtor as an IRA, failed to obtain CLO Holdco's with the DAF's informed consent before it traded in the asset, because it didn't have all of the information. The typical remedy for breach of fiduciary duty is typically damages for any loss suffered by the Plaintiff as a result of the breach. I don't think there's a debate there.

So now we get to Mr. Morris' key argument. His key argument is that we should be talking about res judicata. The elements of res judicata and I think we agree is you have to have identical parties in the action; the prior judgment was rendered by a Court of competent jurisdiction; the final judgment was final on the merits, and the cases involved the same causes of action or the same transaction and nexus of facts.

Now I'm going to skip to three, because I think that's one of the key points that we disagree with them on. There is no case, Your Honor, that we could find, and no case that I read them citing that says an order on an 9019 has

preclusive effect under res judicata under an objector to the settlement. We looked. We looked in the Fifth Circuit. We looked outside of the Fifth Circuit. No District Court, no Fifth Circuit Court of Appeals' opinion we could find held that a 9019 order has res judicata effect on an objector's objection. And I think the reason is pretty simple. Is it doesn't.

Because the Plaintiff's claims, here our claims hadn't even accrued. We have a four year statute of limitations, but I think more importantly is that, as the Fifth Circuit said, the 9019 motion grants the Court discretion. It's not supposed to be a mini trial. The Court can approve a settlement over even the valid objection of an objector. It's not a trial on the merits. It's not supposed to be a trial on the merits. It's not supposed to be a disposition on the merits.

So the fact that Your Honor could have approved the 9019 settlement with HarbourVest, even if we had a valid objection, means this isn't a disposition on the merits, as res judicata would envision. It wasn't a trial on the merits, even though it was withdrawn.

The other elements that we would point out to is that neither the DAV nor Holdco were parties to the dispute between HarbourVest and Highland. And this keys off of the issue that I just raised. The cases that are cited by the debtor to Your

Honor all have to do with where one of the settling parties is trying to undo the settlement for some collateral reason. And the Courts have held, no, that's res judicata, because you were a party to the action. HarbourVest brought the claims against Highland. Highland settled those claims.

CLO Holdco was collateral to that settlement, it's not a -- excuse me, collateral to that dispute. It's not a party to that dispute. Its claims weren't being resolved by the settlement. And while you have a notice to all creditors and those objections can be raised, there was not inherently any manner for resolving those objections on their own merits. Only -- it was only resolved in so far as deciding whether or not the settlement was in the best interest of the debtor, which Your Honor decided, and we don't challenge that. But we do argue that it caused damages and the debtor shouldn't get off for those damages.

The fourth element is that the --

THE COURT: Just for the record, the standard in a 9019 context is not best interest of the debtor, right?

MR. SBAITI: Your Honor, I mean that's what the rule says and Your Honor's order --

THE COURT: That is not what the rule says. The rule is actually very sparsely worded and then we have Fifth Circuit case law and U.S. Supreme Court law that talk about what the standard is.

MR. SBAITI: Yes, Your Honor. And there are five --

THE COURT: And it's -- is it fair?

MR. SBAITI: There are five elements.

THE COURT: Is it fair and equitable and in the best interest of the estate given a long list --

MR. SBAITI: Correct, Your Honor. And I didn't mean to --

THE COURT: -- of considerations that the Court is supposed to consider that "bear on the wisdom of the settlement." Okay. So it's actually much more involved, is my point, than is it in the best interest of the estate. Is it in the best interest of the estate and fair and equitable given all factors bearing on the wisdom of the compromise? And then we have a long laundry list of things the Court should consider as part of that analysis.

MR. SBAITI: That's a --

THE COURT: I just bring that up because if I'm still -- my brain is still stuck five minutes ago on your comment that you can't find any case saying that an order approving a 9019 compromise has res judicata effect on creditors. And it's -- let me just say it's shocking to me that someone would argue otherwise. Bankruptcy is a collective proceeding --

MR. SBAITI: Your Honor --

THE COURT: -- where creditors can weigh in and object and raise whatever arguments they think the Court should

consider that bear on the wisdom of the compromise. And the Fifth Circuit in Foster Mortgage has said the Court should give great deference to the views of the creditors, the paramount interest of creditors.

So it's a really sort of shocking proposition that the order approving a 9019 compromise wouldn't have res judicata effect on all parties and interests who got notice of that. So if you have any elaboration on that, I'd like to hear it.

MR. SBAITI: Your Honor, we looked at the Fifth Circuit cases that they cited, which I believe included that case. And even in that case, the point that we made in our papers and the point I was trying to arrive at is that among the factors, yes, the Court should give great deference to the creditors. But among the factors is not that the objections lack merit or are meritless or that they wouldn't be winnable if they were simply standalone claims.

And that was really the only point I was trying to make is that Your Honor has discretion. Granted it's -- as you mentioned, it's not unfettered discretion. It's bounded by standards and there are -- there is, I know, about five standards Your Honor has to consider or the Court has to consider. But among those, that laundry list of standards, is not that the Court finds that any objection lacks merit. And that was really the only point I was making.

And in terms of the case law, we looked at the Fifth Circuit. We looked, frankly, outside the Fifth Circuit as much as we could, and because this is actually not an easy one to research, as it turned out, despite the language. And we also looked for district court opinions in the Fifth Circuit to see did any district court or did any court of appeals give this type of approval to the standard that a 9019 order has res judicata effect on a claim raised in an objection by a creditor.

And we couldn't find any and I read all the cases that Mr. Morris cited in his papers, and they didn't cite one that explicitly said that. They tried to drive at it through insinuation that, well, if the Court has to give great deference or if the Court has to take into account the underlying facts and the fact that there is discovery, surely that must mean this is akin to the trial on the merits. And I think that's where we simply disagree in good faith. I'm not ascribing any bad intention. But we disagree that that's where the law goes.

Res judicata is not -- while it's supposed to stop the relitigation of issues, it is predicated on there having been actual litigation of those issues. And when HarbourVest and Highland settle a case and my clients show up with an objection, even though they withdraw an objection, that, in our opinion -- and we're asking the Court to see it our way -- is

not trial on the merits. It's not a disposition on the merits of the objection in and of itself. Some objections we can --

THE COURT: But the context matters. In the context of a 9019 compromise, the hearing is about look at the bonafide ease of the settlement. And it's either fair and equitable and in the best interest of the estate or not. And an objector can say this is a terrible settlement and here's why it's a terrible settlement and let me cross-examine the movant and let me put on my own witness that will enlighten the Court as to why this is a terrible settlement, why I say terrible, why it's not fair and equitable.

That's your chance to convince the Court, don't approve this settlement because there are, you know, 14 problems with it. And if you convince the Court, then you convince the Court and it's not approved. If you don't, you appeal, and we do have an appeal of the settlement order.

So, again, I'm not understanding the "res judicata doesn't apply" argument.

MR. SBAITI: Your Honor, if I could riff on two points based upon what you just said, if I could address those.

The first is there are clearly two kinds of objections that get -- at least two kinds of objections that get raised in these 9019 approval hearings. The two that you heard recounted, some were this is bad for the estate. There's reasons why we don't think the estate will benefit from it and

it will be harmed from it.

And those types of objections, which I believe mostly comprise the objections that Mr. Morris was talking about because they are concerns for the estate. And so creditors who want to get money from the estate are concerned that the settlement will not enter (phonetic) to the benefit of the estate, and therefore, not enter to their benefit as creditors. That's number one.

But those don't adhere in a lawsuit. Those aren't claims for damages that the settlement is going to create for the person objection or for the party objecting. There's a whole separate set of objections similar to the ones HCLO Holdco raised where that what inheres in the objection is this is actually going to cause us some kind of damage.

And so, the factors though, don't require the Court in those second set of instances to say, well, you know what? Not only do I think you're wrong, but I think that your lawsuit, the underlying causes of action that give rise to this objection, have no merit on their own face, that the discovery is not there to support them, that a jury is not going to find there. I am now the trier or the Court is now the trier of fact on the merits of the underlying causes of action that animate the objection.

And that's where I believe we're diverging with the debtor on the law. It goes too far to say that a 9019 hearing

where the Court in the end has discretion to approve it, even over a meritorious objection by any party, regardless of what bucket of objections the objection falls into. It goes -- our argument today, Your Honor, and we're asking the Court to see it our way, is that that would go too far. That an actual cause of action shouldn't be eradicated simply because of the 9019 process because, as you pointed out, the Court does have to go through a litany of factors.

And if the Court determines that it's fair and it's more equitable to overrule the objection, the Court has that discretion. And we're not here to unwind that discretion.

But the settlement process did violate certain obligations and did cause my client damages. And that's what we're saying isn't precluded.

THE COURT: Okay.

MR. SBAITI: The fourth element, Your Honor, which I guess in many ways maps on to the argument I just made to Your Honor is that the cases, the underlying cases, do not involve the same claims. Plaintiffs' claims arise from the settlement process itself and not from the underlying issues being settled between HarbourVest and Highland. So that's why we think at least three of the four elements aren't met here. And we'll reserve on the papers, you know, whether jurisdiction was applicable because I think that's probably water under the bridge at this point in the oral argument.

Now, Mr. Morris attacks the case that we cite, Applewood Chair vs. Three Rivers Planning. And he argues that, well, this is not applicable. And the argument he made however was he put it in the context of, well, the parties there, the issue was you had guarantors who were not parties in their capacity as guarantors. But that's not actually what the Court held.

The Court didn't say that the release wasn't applicable to them because they didn't appear as parties in their guarantee capacities. They -- the Court held that, well, the specific discharge language doesn't enumerate those specific guarantees, and so therefore it's not released.

And where this dovetails, we believe, as closely as we can, this isn't a 9019 case. This is a final confirmed plan. But where it dovetails with what our argument is, is that the Court there as well was essentially saying the underlying causes of action weren't really presented to us, so we're not -- we -- and the confirmation of the plan didn't involve disposing of them, so we're not going to say that they are precluded. And we think that that's as close an analogy as we've found in the Fifth Circuit to the issues here today.

So I would say, Your Honor, that we believe that dispenses with the res judicata argument. The judicial estoppel argument, they conflate the language. I'll go back to this for a second. They conflate the language of judicial

estoppel on the success of the claim. None of the cases they cite on judicial estoppel involved where a party took a position, withdrew their argument, and then the Court moved on.

Mr. Morris tries to convert a judicial estoppel claim into a judicial reliance claim, which is not the purpose of the doctrine and is not the doctrine at all. The doctrine is that if you take a successful position in one court, you can't take the opposite position in another court. CLO Holdco didn't take a successful position in one court and then change its position later on. In fact, its positions, as Mr. Morris stated, are remarkably similar. They're not inconsistent, which is the problem with their judicial estoppel argument. And we -- I think we fairly briefed that in our papers and we'll otherwise rest on the papers.

To deal -- to address the actual claims, again, I come back to the idea of a fiduciary duty claim, which is our lead claim. And to be clear, it's a state claim predicated on the violation of federally imposed fiduciary duties.

And I'm looking for a clock to make sure I'm not abusing Your Honor's time, and I don't have one right in front of me because my screen -- my screen is up.

Your Honor, the Douglass v. Beakley case is, like I said, is Judge Boyle's case. It specifically provides a cause of action based upon violations of the Advisers Act. We also cite about four or five other cases in footnote 8 of our

response from other circuits, including the Third Circuit, the Belton case that I referred to earlier, all of which held that, yes, a state fiduciary duty claim can be predicated on breaches of a federal Advisers Act violation.

The other point that they make on the fiduciary duty claim is they argue HCMLP doesn't owe fiduciary duties to CLO Holdco. And the cases they cite, Your Honor, we dealt with in the papers why they were distinguishable, because in those cases they were dealing with the fact that there wasn't any harm or any direct relationship. But what they ignore is the actual language of the Advisers Act, which is important.

Well, first of all, Mr. Seery admitted in his own testimony during the approval hearing in July of 2019 that he says, "We owe." He says, "There are third party investors in the fund -- in these funds who have no relation whatsoever to Highland, and we owe them a fiduciary duty both to manage their assets prudently, but also to seek to maximize value." I think Mr. Seery was absolutely correct when he said that. Highland owes fiduciary duties to the investors in the funds that Highland manages. The core of our case is that Highland is using or abusing the assets of the funds it managed in HCLOF for its own enrichment, which is a classic breach of fiduciary duty case under the Advisers Act.

Now -- excuse me. The other point that I would say, Your Honor, is that there is a statutory basis for us to argue

a breach of fiduciary duty. Excuse me. I didn't mean to stop sharing. I apologize.

Are you back with me, Your Honor, on my --

THE COURT: Yes.

MR. SBAITI: -- PowerPoint?

THE COURT: Yes.

MR. SBAITI: Sorry about that, Your Honor. I just hit the wrong thing. I'm not very technologically savvy. Here we go.

So Holdco is an investor in HCLOF, which is a pooled investment vehicle. A pooled investment vehicle under the case law we cite is simply defined as an investment vehicle that doesn't publicly solicit investors and has few than 100 investors. Highland advises it. That's the same holding in TransAmerica Mortgage, by the way, which we also cite.

15 U.S. C. Section 80(b)(6) establishes the federal fiduciary standards to govern the conduct of registered investment advisers. That's also the TransAmerica case. 15 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to decide the scope of those duties that are imposed under the statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-8.

And it expressly states, and we cite the statute or the regular in full in our papers, that the fiduciary duties are owed to investors in the pooled investment vehicles. It

specifically says that. It talks about two different duties owed and they're owed to the investors in the vehicles, which means they're owed to Holdco as an investor in HCLOF, which is the vehicle that Highland manages.

It's black and white in the regulation. And we haven't seen any response. There was no response of that in the reply that was filed, Your Honor. And so the argument that there's not a fiduciary duty owed to Holdco because it's merely an investor in HCLOF simply doesn't comport with the law.

And finally, the petition lays out the basis for our claims including the applicable federal and state law. Plaintiffs' response lays out why the legal arguments aren't opposite at the 12(b)(6) stage and Rule 9(b) is met where necessary under the federal claim. And I'm trying to unshare so that I can get back to regular argument.

I'd like to briefly address Mr. Morris' argument, Your Honor. Your Honor, I re-raise my argument that I made before, which is that a 12(b)(6) motion and hearing is not the appropriate time for all the evidence that was poured in here. And I understand Mr. Morris' contention, well, it's really hard to ignore all the history of this case. But a lot of that history really boils down to things that were actually admitted in the complaint. The complaint recognized there was a 9019. But what Mr. Morris wants to do is go beyond that and to go to what people said and what they must have meant. What Mr.

Dondero must have meant in his objection, what Dugaboy must have meant by their objection, what Mr. Pugatch must have meant by his testimony.

All of that is highly improper at this stage of the proceeding, Your Honor. It's outside of the 12(b)(6) confines. It's outside the four corners of the complaint. And we object to all of that evidence being considered.

THE COURT: Let me --

MR. SBAITI: The question we --

THE COURT: Let me ask you about that procedural point.

MR. SBAITI: Yes, Your Honor.

THE COURT: As we know, 12(d) provides that if matters outside the pleadings are presented to and not excluded by the Court in a 12(b)(6) motion, the motion must be treated as one for a summary judgment under Rule 56 and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Are you -- what are you arguing? That I should treat it as a motion for summary judgment and give you more time to present other materials? I mean, you both presented an appendix, okay. And I'm telling you we're seeing this more and more, I've noticed. People are going beyond the four corners of a motion to dismiss and attaching things. And there's some, you know, Fifth Circuit authority that says, well, if what is

attached is integral to understanding, you know, an allegation or whatever in the pleading, you know, there is some discretion to go outside the four corners.

So I'm trying to understand the point you're making with this. Are you saying I should treat it as a motion for summary judgment or do these attachments really -- you know, do I have authority under the Fifth Circuit to consider them as part of the 12(b)(6) motion or not?

MR. SBAITI: Typically, in our experience, Your Honor, is when a summary or when a 12(b)(6) is going to be treated as summary judgment under 12(d), the Court says that and then the parties are given an opportunity, as you said, to go do some discovery in order to put together the evidence and materials to then come back and respond as a summary judgment. We responded to a 12(b)(6) and objected to the evidence. If the Court wants to treat it as a summary judgment, then we would ask for an opportunity for -- to conduct discovery in order to be able to respond as a summary judgment motion, but we didn't -- because we responded to a 12(b)(6) --

THE COURT: You did the same thing though. You did the same thing in your response. You submitted an appendix of evidence, if you want to call it evidence. As someone pointed out, it's stuff from the bankruptcy court record. I don't think it went beyond what was already in the bankruptcy court.

MR. MORRIS: And if I -- can I be heard on this, Your

Honor?

THE COURT: You can. You can.

MR. MORRIS: Just to respond. This is really quite simple. The motion to dismiss is based on res judicata. Res judicata necessarily requires a review of what happened in connection with the prior hearing. There's nothing that we have identified or put forth in the appendix or on our exhibit list except for the pleadings in the 9019, the transcripts, the one deposition transcript, the one trial transcript, the settlement agreement, the transfer agreement. I'd love to know what the Court couldn't or shouldn't take judicial notice of. There is no emails. There is no -- there is no -- there is no extrinsic evidence, if you will. All of this is either on the docket or was presented as part of the hearing.

THE COURT: Yeah. I'm just trying to ferret --

MR. MORRIS: And it's necessary. And it's necessary for the motion.

THE COURT: Yeah. I'm just trying to ferret out the procedural position that's being asserted here. And I don't have the case cites off the top of my brain, but there is authority from at least the Northern District judges, if not the Fifth Circuit, saying in a 12(b)(6) motion I can take judicial notice of items in the record. And then, you know, there -- I know there's Fifth Circuit authority saying I can go beyond the four corners in a 12(b) context if it's just basic,

you know, explaining things that are in allegations. You know, such as --

MR. SBAITI: May I address that, Your Honor?

THE COURT: -- such as if a contract is in dispute, okay. Like there's no way you can have a cause of action under the contract and here's the contract. So I'm just trying to nail down your procedural position here.

MR. SBAITI: Your Honor, the distinction I was trying to make that I don't think I put as artfully as I might be able to put now is in a 12(b)(6) if there's a contract, as you said, if there's a legal document, a contract and order that's integral to the case, Your Honor can take judicial notice of that. Generally, a court can take judicial notice of filings in a bankruptcy, the fact that they were filed.

So the transcripts, which Your Honor can't take judicial notice of, is the truth of those. And that was what I was objecting to is it's one thing for him to say an objection was filed and therefore, because an objection was filed, that should be it. That was your only chance. I'm not saying Mr. Morris can't make that argument.

But when he goes beyond the fact of the filing or the fact that there was a transcript or the fact that there was a deposition and starts to read from the depositions or read from the filings and say this is what those mean, that goes against the 12(b)(6) parameters because, number one, now it's

substantive evidence and not simply a judicial notice of something that's right there in front of the Court, i.e., something on its own docket. Because those statements and the interpretation of those statements are subject to credibility findings. They're subject to clarification. They're subject to rebuttal. That's the purpose of discovery.

And so if Your Honor -- and Mr. Morris is right. Usually, res judicata involves knowing what happened in the prior proceedings. So if all he wants to do is rest on the fact that an objection was filed by CLO Holdco and maybe even other people, and that should be it and he thinks that's enough for Your Honor to say res judicata applies, then I don't think we have a problem. It's when he goes beyond that and says, Your Honor, these people must have known and this is what they meant by their argument, that's what I'm asking Your Honor not to consider. And if Mr. Morris wants you to consider that, that's a summary judgment motion and we should have the opportunity to do discovery at the very least into the issues he has now raised as supporting his res judicata defense which he has the burden of proof on.

MR. MORRIS: Your Honor, this is one of the strangest arguments I have ever heard. I'm allowed to offer the Court and the Court is allowed to accept the documents, but I'm not allowed to read them. I'm not allowed to make arguments. I don't understand what that even means. If it were a contract,

I would be allowed to put the contract in front of Your Honor, but I wouldn't be able to argue why the contract doesn't say what the Plaintiff says. I don't get it.

THE COURT: Okay.

MR. MORRIS: That's --

THE COURT: Just I've heard enough on this. I don't think we have moved into Rule 12(e), that realm of me needing to treat this as a motion for summary judgment. I think the so-called evidence, the appendix that was attached to the motion as well as the appendix that was attached to Plaintiffs' response, it's stuff that I can take judicial notice of that's in the record of this Court and I can look at it. You know, it is what it is, the record of this Court.

All right. So I have nine people waiting in chambers. I'm trying to figure out should I take a break now or are you fairly close to wrapping up. Either answer is fine, Mr. Sbaiti. I just need to figure out who I make wait here.

MR. SBAITI: I have -- oh, I'm sorry. I didn't mean to interrupt you, Your Honor. I was just going to say I have five minutes left, but I know Mr. Morris probably wants to come back. So if you want to break now and we can come back at whenever the Court wants us to, we can do so.

THE COURT: All right. Why don't you make your final five minutes and then we'll take a break?

MR. SBAITI: Okay. Thank you, Your Honor.

I just wanted to address some of the arguments that Mr. Morris raised in his argument. The first thing is -- and I addressed this in part -- but Mr. Morris makes a big deal about paragraph 127 of the complaint and essentially suggests that we're the -- or that Mr. Dondero is the perpetrator of a nefarious scheme. Whereas, what the pleading actually says, and I again encourage Your Honor to re-read -- to read it specifically, is that Mr. Dondero warned Mr. Seery not to trade in the stock and not to make any transactions because the stock was going to appreciate in value.

That has two implications for us, Your Honor. Number one, it means Mr. Seery was a tippee of insider information, and number two, it means that Mr. Seery, if he did trade on that information or if he did pass that information on to someone else, that is a problem from the Advisers Act standpoint, which is really the only purpose of saying that.

While paragraph 127 also says that that should have caused Mr. Seery to revalue the NAV of HCLOF, it does not state and we did not plead that the entire value of HCLOF is tied to the MGM stock. So the insinuation that that somehow gave us inside information about what the true value of HCLOF was and we should have known or that Mr. Dondero should have known is simply untrue.

The other argument Mr. -- that Mr. Morris likes to harp on is that CLO Holdco withdrew its argument, but he

characterizes Mr. Kane's withdrawal testimony -- as he says, Mr. Kane admitted that CLO Holdco lacked the superior right to obtain the HarbourVest. If you read the very language that was highlighted on Mr. Morris' slide, that's not what Mr. Kane says. Mr. Kane says, "We've gone back to the drawing board. We've read your reply. And my client has given me permission to withdraw the argument or withdraw the objection." That's all he said. There was not an admission that he was wrong. There was not an admission that they had made a mistake. There was simply an admission that they decided to withdraw the objection for whatever reason.

Lastly, on the specific claims --

THE COURT: That's not an accurate description of the record. He said he looked at --

MR. SBAITI: Your Honor, I was reading it along with him.

THE COURT: -- Guernsey Law. And I don't know if his words were deep dive.

MR. SBAITI: Yeah.

THE COURT: But he had looked at the agreements extensively. That's just not what he said.

MR. SBAITI: And he said he was with -- Your Honor, he said he was withdrawing. He didn't say we were wrong. He didn't say we don't have a claim. What he said was, "We're withdrawing the objection."

THE COURT: After doing an extensive look at the agreements in Guernsey Law, okay, so.

MR. SBAITI: Sure. But, Your Honor, he might have -- he could just as easily thought we have a chance, but it's not a good one. And frankly, we'll be here for 20 days and we're withdrawing it for that reason because we'll live to fight another day. Your Honor, there's an innumerable number. To simply say that he admitted that they didn't have a correct claim, it's just he didn't say that. That's all. That's the only point I'm making.

Your Honor, I don't disagree with the debtor that the Court's exculpation clause gets rid of the negligence claim which was obviously filed before the effective date, so that claim is gone.

And I think the last argument that Mr. Morris makes on the RICO claim is the federal court, the Supreme Court standard for pleading a RICO claim, that acts that only continue for a few weeks are not -- don't set out a RICO claim. Your Honor, in our response to that, we actually submitted an amended complaint that shows that the type of acts we're talking about, the pattern of the debtor using its investor vehicles assets to liquidate is a long pattern and practice than simply the HarbourVest suit. And so, we move to amend on that basis to satisfy that pleading defect, which is the main one that they focused on.

That's all I have, Your Honor.

THE COURT: All right. Thank you.

We're going to take a 15 minute break and come back. I'll ask Mr. Jordan and Mr. Bessette did they have anything they wanted to say today. I know they joined in the debtor's motion. And then we'll let Mr. Morris have rebuttal.

All right. So we'll be back in 15 minutes.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated.

We're back on the record in Charitable DAF v. Highland Capital. All right. So I promised I was going to go back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan, Mr. Bessette, is there anything you wanted to say for oral argument?

MR. JORDAN: Thank you, Your Honor. John Jordan on behalf of HCLOF.

Our points are two procedural points. The first is as the Court anticipated, in our motion to dismiss filed back in August, we joined in the motion to dismiss of Highland. And so to the extent that the Court after deliberation is inclined to grant that motion, we would ask that as a joining party, HCLOF be pulled along with that.

The second procedural point is that back in our motion to dismiss, we pointed out that the complaint does not actually allege anything against HCLOF. In the story, we're essentially the football and neither Oklahoma nor UT. And we pointed that out as an additional argument to what you've heard today. That motion was never responded to. The deadline by agreement was extended to October 11th. And the lack of response was, we believe, not inadvertent but simply an acknowledgment that HCLOF is not a party that anything is being claimed against.

It particularly makes sense since effectively and in rough numbers, they're half owned by both sides. So for every dollar that HCLOF spends hanging around the case, the parties are paying essentially 100 cents collectively. So for that reason, we would ask, and subject to Mr. Sbaiti's input, whether the Court would ask us or direct us to upload an order granting our motion as unopposed. We just feel like we don't have any role in this case.

THE COURT: All right.

Mr. Sbaiti, what about that?

MR. SBAITI: Your Honor, they were originally added as a nominal party. And as a nominal party, because of the potential need to have a derivative action, I think that based upon Highland's arguments and the arguments that we had, I don't think the derivative action is necessary for us to

maintain on a go-forward basis. And so we don't oppose them being dismissed.

THE COURT: All right. Then I assume, Mr. Morris, you don't have any problem with this, correct?

MR. MORRIS: No, Your Honor.

THE COURT: Okay. So I'll look for the parties to submit an agreed order of dismissal of HCLOF after the hearing. All right?

MR. JORDAN: Thank you, Your Honor.

THE COURT: All right. Mr. Morris, you get the last word.

MR. MORRIS: Thank you, Your Honor. I hope to be relatively brief. I really just want to focus on the arguments concerning whether or not the order that was entered by this Court was an order that was entered on the merits.

As the Court is well aware, a 9019 motion filed by a debtor is done so on notice. It is to give all parties in interest an opportunity to be heard, not just as to whether or not the debtor meets its burden of proof under Rule 9019 but whether or not the Court can find, as it must, that the proposed settlement is in the best interest of the estate.

The purpose of -- I mean that is the purpose of the giving notice so that everybody has a chance to be heard. The questions that the Court asked, the questions that every bankruptcy court asks in a 9019 is can the debtor do this deal,

should the debtor do this deal, is it in the best interest of the estate to do this deal.

And, you know, the idea that a 9019 order is somehow res judicata only to the parties to a settlement is just something that doesn't make any sense to me because it abrogates so many rules that exist that allows and encourages and requires parties who have objections to be heard.

Mr. Sbaiti's clients filed an objection. They initiated a contested matter. They obtained rights. They were litigants. They are litigants in a contested matter where they're required to tell the Court what objections they have to the settlement, and they did that.

Mr. Sbaiti, you know, told me that I wasn't allowed to characterize the words that are used in the documents that have now been admitted by the Court. And, yet, I heard him say that maybe Mr. Kane (phonetic) really meant to tell Your Honor that he was withdrawing the claim because he was going to save it for another day.

I'd just ask the Court to look at the transcript. I don't have to interpret it at all. And I'd ask the Court to read the words. I can put them back up on the screen, but they're pretty short. It's at Pages 7 and 8 of the transcript of what Mr. Kane told you and what you said in response. It's on the page, not my interpretation, and what the import of that was.

Mr. Sbaiti believes, I guess, if one is allowed to engage in such conduct without consequence, that one is allowed to allow to file objections, cause the Court and the litigants to participate, to give discovery, to write briefs, to do analyses, withdraw it on the basis of their own good faith analysis of Guernsey law of the documents and somehow say it's irrelevant. Not what the law is, not what res judicata is intended to do.

He should have put all of his cards on the table. In fact, I think that Mr. Kane believed he was putting all of his cards on the table because that's what he did. He filed a very comprehensive objection. He asserted a right to the opportunity that the debtor was proposing to take in the 9019 motion. That's what he was doing. He was objecting on the basis that he claimed his client had a superior right to this asset.

And he didn't -- like I said earlier, Your Honor, I don't think he would be permitted, I don't think these claims would fly today if no objection was filed. But the fact that there was renders, I think, indisputable that there was a finding on the merits, right. And the only reason that the Court didn't rule on Mr. Kane's motion, the only reason the Court didn't rule on it is because Mr. Kane withdrew it.

Is that really the way this process is supposed to work, that one can tell the Court that after a review of the

documents, I'm going to withdraw the objection and then file a claim for damages three months later with a different client, with a different control person, with a different lawyer? That's okay under doctrine of res judicata? I don't think so.

They had a full and fair opportunity. The fact that this was somehow -- you know, they're denigrating the fact that this was a 9019 motion. There's not supposed to be a mini-trial. Your Honor had discretion as to what to do. Every court in every bench trial has discretion as to what to do and whether or not to overrule objections and whether or not to substain [sic] objections. That's what judges to.

And there's nothing offensive about the fact that it happened in the context of a 9019 motion. They don't get to sit on their hands and wait to fight another day. If they believed that the debtor was exposing itself to liability, and that's what they actually say in the opposition, that's what I actually think they say in the complaint, accept it as true, they believe that the debtor created liability for itself by rendering -- by entering into this transaction.

Shouldn't they have raised their hand and said you can't do this deal, right? And the only response to that -- they have to that is they had no idea about value. Paragraph 127, Your Honor, Mr. Dondero, the architect of this complaint, as was proven on June 8th, knew very well about value. And it doesn't matter that it was only MGM. Your Honor commented on

that at the June 8th hearing in a different context. But everybody knows, right, it is. He sits on the board of MGM.

And I'm sorry if I called him a tippee instead of a tipper. But if this complaint goes forward, we'll dig into that real deep. But there's no reason it ought to, Your Honor. This case ought to be dismissed on res judicata grounds. It should be dismissed on judicial estoppel grounds. And it should be dismissed for all the reasons that I said in my argument in my brief.

But I do just want to close with one point, and that is to read from a case called Goldstein, which I think I alluded to earlier on this issue of whether there's a fiduciary duty that's owed by an advisor to an investor and a fund:

> "At best, it is counterintuitive to characterize the investors in a hedge fund as the clients of the advisors. The advisor owes fiduciary duties only to the fund, not to the fund's investors."

There's a lot of discussion about fiduciary duties, Your Honor. But to the extent that they have any basis to defeat the motion to dismiss on res judicata or collateral estoppel grounds, we hope and we trust and we know the Court will review the case law vigorously to test some of the assertions to that.

I have nothing further, Your Honor.

THE COURT: All right. Well, thank you to all of

you.

As a reminder, I don't think you need it, but as a reminder, I am essentially acting as a magistrate for Judge Boyle in this action. And whichever way I go on whichever theories, I think she would expect a thorough write-up. It would, of course, be in the form of a report and recommendation for her to either adopt or not if I dispose of some or all of the counts in the lawsuit.

Even to the extent I deny dismissal, even though the rule typically does not require a court to make detailed findings and conclusions in connection with a denial of a motion to dismiss, again, since I'm sitting as a magistrate, I think Judge Boyle would expect some thorough explanations and reasoning from me.

So that's my way of saying I'm taking this under advisement. I am going to drill down on some of the cases that have been argued. I think some important issues are raised here that need some thorough reasoning.

So I will do the best to get this out without too much delay. I think there's probably zero chance, zero chance I'm going to get it done by the end of the year. We're just too behind with some of our under-advisements. But I will try earnestly to get it out fairly soon after the first of the year. All right?

Thank you. You all have a good holiday.

THE CLERK: All rise.

(Proceedings concluded at 12:37 p.m.)

* * * * *

C E R T I F I C A T I O N

We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND PATTIE MITCHELL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

/s/ Karen Watson

KAREN WATSON, CET-1039

/s/ Crystal Thomas

CRYSTAL THOMAS, CET-

/s/ Pattie Mitchell

PATTIE MITCHELL

LIBERTY TRANSCRIPTS DATE: November 23, 2021